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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 83

INDEPENDENT WAREHOUSES, INC., PENNSYLVANIA COAL COMPANY, ERIE RAILROAD COMPANY AND JAMES THOMPSON, APPELLANTS,

vs.

WILLIAM SCHEELE, RECORDER OF THE TOWNSHIP OF SADDLE RIVER, AND THE TOWNSHIP OF SADDLE RIVER

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

FILED APRIL 11, 1946.

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[fol. 1] **IN SUPREME COURT OF NEW JERSEY**

WRIT OF CERTIORARI

Allowed and Filed December 13, 1943

(L. S.)

New Jersey, ss.: THE STATE OF NEW JERSEY TO: WILLIAM SCHEELE, Recorder of the Township of Saddle River, and the Township of Saddle River, a municipal corporation of the State of New Jersey—Greeting:

We being willing, for certain reasons, to be certified of the judgment of conviction rendered by you William Scheele, Recorder of the Township of Saddle River, on or about November 30, 1943, in proceedings against Independent Warehouses, Inc., a corporation of the State of New York, for violation of Section 1 of an ordinance of said Township entitled "An Ordinance to regulate and license the business of the storage of personal property in warehouses engaged in the business of storing goods for hire and the place or premises in or at which said business is conducted and carried on, to prescribe fees for said licenses, and to provide penalties for the violation of this ordinance," and the penalty imposed thereon, and the ordinance upon which said proceedings are based, do command you that you, and each of you, send, under your respective seals, to the Justices of our Supreme Court at Trenton, on the 31st day of December, 1943, the said judgment, proceedings and penalty imposed and the ordinance upon which they are based, together with all things touching and concerning the same, as fully as they remain before you and each of you, together with this Writ, that we may cause to be done thereupon what of right and according to law ought to be done.

[fol. 2] Witness, Thomas J. Brogan, Esquire, Chief Justice of our said Supreme Court, at Trenton, the 13th day of December, One Thousand, Nine Hundred and Forty-three.

James J. Gavin, Clerk.

Collins & Corbin, Attorneys.

A similar writ was allowed and filed the same day in favor of James Thompson, as prosecutor.

IN SUPREME COURT OF NEW JERSEY

ORDER FOR INTERVENTION—Filed December 14, 1943

This matter being opened to the court by Hobart, Minard & Cooper, attorneys for Pennsylvania Coal Company, and Erie Railroad Company, and it appearing that a writ of certiorari allowed in the above entitled action involves the validity of an ordinance adopted January 25, 1943, by the Township of Saddle River, and it further appearing from their verified petition presented on this date, that a decision of this court upon said writ may affect adversely the interests of said Pennsylvania Coal Company and Erie Railroad Company, and upon good cause being shown, it is on this 13th day of December, 1943,

Ordered that Pennsylvania Coal Company and Erie Railroad Company, be, and they are hereby, made parties to this action on the side of the prosecutor, and it is further

Ordered that their names be added to the writ of certiorari allowed herein and that they, and each of them, be [fol. 3] given notice of all further proceedings herein to be had in accordance with the practice, and the rules, of this court, and it is further

Ordered that they, and each of them, may, on notice, take depositions under said writ, in accordance with the statute in such case made and provided and in accordance with the rules of this court, which depositions shall constitute a part of the record before this court upon the consideration of said writ of certiorari.

Joseph L. Bodine, Supreme Court Justice.

IN SUPREME COURT OF NEW JERSEY

RETURN TO WRIT OF PROSECUTOR, INDEPENDENT WAREHOUSES, INC.—Filed December 30, 1943

To the Honorable Justices of the Supreme Court of Judicature of New Jersey:

In obedience to the command of the writ directed to William Scheele, Recorder of the Township of Saddle River, and the Township of Saddle River, a municipal corporation of the State of New Jersey, I hereby certify and send under

my seal to the Supreme Court of Judicature of New Jersey the judgment of conviction rendered by me on or about November 30th, 1943, in proceedings against Independent Warehouses, Inc. for violation of Section 1 of an ordinance of the Township of Saddle River entitled "An Ordinance to Regulate and License the Business of the Storage of Per- [fol. 4] sonal Property in Warehouses Engaged in the Business of Storing Goods for Hire and the Place or Premises in or at Which Said Business is Conducted and Carried On, to Prescribe Fees for Such Licenses, and to Provide Penalties for the Violation of this Ordinance," and the penalty imposed thereon, and the ordinance upon which said proceedings are based, together with all matters appertaining thereto as fully and entirely as before me and the Township of Saddle River they remain.

In Witness Whereof, I, William Scheele, Recorder of the Township of Saddle River, have hereunto set my hand and seal at the Township of Saddle River, New Jersey, this 29th day of December, 1943.

—— —— (L. S.) William Scheele, Recorder of the Township of Saddle River. (Seal.)

SUMMONS

RECORDER'S COURT, SADDLE RIVER TOWNSHIP

STATE OF NEW JERSEY,
Saddle River Township,
County of Bergen, ss:

To Independent Warehouses, Inc.
Address Coalberg, Saddle River Township, Bergen County, N. J.

[fol. 5] Complaint has been made this day by one Charles Imperato, Chief of Police, that you did on the 12th day of April A. D. 1943, in the Saddle River Township, violate Sec. 1 of Ordinance entitled "An Ordinance to Regulate and License the Business of the Storage of Personal Property in Warehouses Engaged in the Business of Storing Goods for Hire and the Place or Premises in or at Which said Business is Conducted and Carried On, to Prescribe Fees for Such Licenses and to Provide Penalties for the Violation of this Ordinance."

You are hereby Summoned to appear Personally before the Recorder of Saddle River Township, at the Township Recorder's Court, Municipal Building, Township aforesaid, on the 20th day of April A. D. 1943, at 8 o'clock P. M., to answer to the said complaint and to be further dealt with according to law.

Witness William Scheele, Esquire, Recorder of the Recorder's Court, Saddle River Township, this 15th day of April 1943.

William Scheele, Clerk to Recorder.

NOTE: Failure to Appear Will Result in the Issuance of a Warrant for Your Arrest: Bring This Summons and Also Your Witnesses, If Any, With You.

[fol. 6]

WARRANT

RECORDER'S COURT, TOWNSHIP OF SADDLE RIVER, COUNTY OF BERGEN, STATE OF NEW JERSEY

Whereas, complaint hath this day been made to me, on oath by Charles Imperato, Chief of Police, that on the 12th day of April, A. D. One Thousand Nine Hundred and Forty-three at Coaiberg, in the Township of Saddle River, in the County of Bergen, one Independent Warehouses, Inc., a corporation conducted or carried on the business of the storage of personal property in a warehouse engaged in storing goods for hire without there having been granted by the Township Committee of the Township of Saddle River a license, which was then and there in force and effect, to conduct said business for the place and premises at which said business was then and there conducted and carried on. All of which was contrary to and in violation of Sec. 1 of an ordinance of the Township of Saddle River aforesaid, entitled "An Ordinance to Regulate and License the Business of the Storage of Personal Property in Warehouses Engaged in the Business of Storing Goods for Hire and the Place or Premises in or at Which said Business is conducted and Carried On, to Prescribe Fees for Such Licenses, and to Provide Penalties for the Violation of this Ordinance."

These are, therefore, in the name of the State of New Jersey, to authorize and require you to apprehend the said

Independent Warehouses, Inc., if in your county it may be found, and bring it forthwith before me, Recorder of the Recorder's Court of the Township of Saddle River, of [fol. 7] the County of Bergen in and for said Township, to answer the said complaint, and be further dealt with as the law directs; hereof you are not to fail; and for so doing this shall be your warrant.

Given under my hand and seal, at my office in the Township of Saddle River, this 15th day of April, 1943.

William Scheele, Recorder, Township of Saddle River, of the County of Bergen.

I return the within Warrant with defendant, into Court, this 30th day of November, 1943.

Charles Imperato, Chief of Police.

COMPLAINT

RECORDER'S COURT, TOWNSHIP OF SADDLE RIVER, COUNTY OF BERGEN, STATE OF NEW JERSEY

STATE OF NEW JERSEY,
County of Bergen, ss:

Before me, William Scheele, Recorder of the Township of Saddle River, personally appeared Charles Imperato, Chief of Police of Township of Saddle River, who being duly sworn according to law, deposeth and saith that on the 12th day of April, 1943, between the hours of 8 and 10 A. M., at the Township of Saddle River aforesaid on Assessment [fol. 8] Map shown as Block 106-D, commonly called Coalberg, one Independent Warehouses, Inc., a corporation, conducted or carried on the business of the storage of personal property in a warehouse engaged in storing goods for hire without there having been granted by the Township Committee of the Township of Saddle River a license, which was then and there in force and effect, to conduct said business for the place and premises at which said business was then and there conducted and carried on.

All of which was contrary to and in violation of Sec. 1 of an ordinance of the Township of Saddle River aforesaid, entitled "An Ordinance to Regulate and License the Business of the Storage of Personal Property in Warehouses

Engaged in the Business of Storing Goods for Hire and the Place or Premises in or at Which said Business is Conducted and Carried on, to Prescribe Fees for Such License, and to Provide Penalties for the Violation of this Ordinance." Introduced January 13th, 1943 and adopted January 25th, 1943.

Therefore, this complainant prays that the said Independent Warehouses, Inc., may be apprehended and held to answer said complaint, and dealt with as Law and Justice may require.

Charles Imperato, Complainant; William Scheele, Presiding Judge.

Subscribed and sworn to before me this 15th day of April, A. D. 1943. William Scheele, Recorder.

[fol. 9] CONVICTION

RECORDER'S COURT, SADDLE RIVER TOWNSHIP

STATE OF NEW JERSEY,
County of Bergen, ss:

Be it remembered that on the 30th day of November, 1943, Independent Warehouses, Inc., a corporation, was brought before me, William Scheele, Recorder of the Township of Saddle River in the County of Bergen, charged with having on April 12th, 1943, in the Township of Saddle River aforesaid at the certain place called Coalberg, appearing on the Assessment Map as Block No. 106-D, conducted or carried on the storage of personal property in a warehouse engaged in the business of storing goods for hire without there having been granted by the Township Committee of the Township of Saddle River a license, which was then and there in force and effect, to conduct said business for the place and premises in or at which said business was conducted and carried on, in violation of Section 1 of an ordinance of the Township of Saddle River entitled "An Ordinance to Regulate and License the Business of the Storage of Personal Property in Warehouses Engaged in the Business of Storing Goods for Hire and the Place or Premises in or at Which said Business is Conducted and Carried On; to Pre-

scribe Fees for Such Licenses, and to Provide Penalties for the Violation of this Ordinance," adopted January 25th, 1943.

The defendant, Independent Warehouses, Inc., having first entered a plea of not guilty, was placed upon trial on the charge made against it as aforesaid.

[fol. 10] Candido Belli, Deputy Township Clerk, having been first duly sworn, identified an ordinance entitled "An Ordinance to Regulate and License the Business of the Storage of Personal Property in Warehouses Engaged in the Business of Storing Goods for Hire and the Place or Premises in or at Which said Business is Conducted and Carried On, to Prescribe Fees for Such Licenses, and to Provide Penalties for the Violation of this Ordinance," as having been duly adopted on January 25th, 1943, by the Township of Saddle River and having been advertised on January 29th, 1943, which ordinance was offered and received in evidence and marked Exhibit S-1. The Deputy Clerk further testified that no license had been issued to Independent Warehouses, Inc. or to any other person to operate a business at the premises known as Coalberg appearing as Block No. 106-D on the Assessment Map of the Township of Saddle River.

James Thompson having been called as a witness and being duly sworn identified his testimony in the matter of Independent Warehouses, Inc. against Township of Saddle River on certiorari in the New Jersey Supreme Court. He further testified that he was an employee of the defendant, Independent Warehouses, Inc., was so employed during the Month of April, 1943, and that during said month the defendant, Independent Warehouses, Inc., was operating the business of the storage of coal in a warehouse engaged in storing goods for hire within the Township of Saddle River at the place known as Coalberg, whereupon the Attorney of the defendant, Independent Warehouses, Inc., stipulated in open Court that said defendant, Independent Warehouses, Inc., conceded that it was operating a busi-[fol. 11] ness at the time and place charged in the complaint in violation of the ordinance referred to therein, if such ordinance was legal and valid.

Counsel for Independent Warehouses, Inc. having been afforded an opportunity to cross examine the witnesses called on behalf of the State and the State having rested its

case against the defendant, defendant called upon its own behalf John F. McCormick who, having been first duly sworn, testified that he was the President of the defendant, Independent Warehouses, Inc. that they were operating a public warehouse for the storage of coal on the date charged in the complaint and that they had never applied for any license therefor under the ordinance referred to in the complaint. He further testified that the area of their operations consisted of 67¼ acres; that Pennsylvania Coal Company owned the land and that they paid rent of $1.00 a year; that they stored coal for the Pennsylvania Coal Company to an amount of about 200,000 tons a year for which they received $800.00 a year; that they have no other income from this yard except this $800.00. On cross examination the witness reaffirmed that the total income of the Company from the yard was only $800.00 a year. He admitted that James Thompson was an employee of Independent Warehouses, Inc. and when questioned as to how his salary was paid out of $800.00 a year he testified that Independent Warehouses, Inc. have other storage yards and the losses from this yard must be charged up against them but was not sure; when questioned as to where they were he testified that he could not say offhand and would have to get the information. He later testified that there were twenty-three employees at the yard in Saddle River and when asked how these salaries [fol. 12] were paid he said he thought they were paid by the Pennsylvania Coal Company. The witness was unable to explain what method of charging was used for the storage of the coal. When questioned as to what the defendant would charge for the storage of five tons he testified that the charge would be $200.00, and when it was explained to him that that would be a charge of $40.00 a ton he said that they had a minimum charge of $200.00, although later he testified that the charge to Pennsylvania Coal Company was a minimum of $500.00 and a maximum of $800.00 per annum. The witness described the operation of his Company as being what is known as a field warehousing arrangement which he admitted was a device to avoid the payment of taxes.

The defendant rested and counsel for the defendant moved for the dismissal of the complaint on the ground that the ordinance referred to in the complaint was not a valid exercise of the licensing power of the Township, that the

license fee would be greatly in excess of the total annual earnings of the defendant and that the ordinance interfered with interstate commerce. The motion of the defendant was denied.

Wherefore, I, the said Recorder of the Township of Saddle River, hereby find the defendant, Independent Warehouses, Inc. guilty as charged in the complaint and impose upon it a fine of $200.00. There may issue execution against the goods and chattels of the said defendant, Independent Warehouses, Inc. to be levied and enforced in the same manner as are executions from the Small Cause Court.

William Scheele, Recorder. (L. S.)

[fol. 13] EXHIBIT S-1

TOWNSHIP OF SADDLE RIVER, BERGEN COUNTY

Notice

An ordinance to regulate and license the business of the storage of personal property in warehouses engaged in the business of storing goods for hire and the place or premises in or at which said business is conducted and carried on, to prescribe fees for such licenses, and to provide penalties for the violation of this ordinance.

Be it ordained by the Township Committee of the Township of Saddle River, in the County of Bergen:

1. Within the limits of the Township of Saddle River, no person, firm or corporation shall conduct or carry on the business of the storage of personal property in a warehouse engaged in storing goods for hire or work in, occupy, or, directly, or indirectly in any manner whatsoever, utilize any place or premises in which is conducted or carried on the storage of personal property in a warehouse engaged in the business of storing goods for hire, unless and until there shall be granted by the Township Committee of the Township of Saddle River in accordance with the terms of this ordinance, and shall be in force and effect, a license to conduct said business for the place and premises in or at which said business shall be conducted and carried on.

[fol. 14] 2. Said license shall be applied for by written application filed with the Township Committee. Such application shall set forth the full name and address of the applicant, the kind or character of personal property to be stored, the location of the place and premises in or at which the business is to be conducted, the total area of the ground space thereof and a diagram of the same. Said application shall also be accompanied with a deposit to cover the license fee for the current year in the amount hereinafter provided.

3. There shall be charged and collected for said license an annual fee to be computed on the basis or rate of three-quarters of a cent (¾ of 1¢) for each square foot of the total ground area of the place and premises in the Township of Saddle River in or at which said business is conducted or carried on. Said license shall expire on January first of each year. Said license fee shall be payable in advance for each year or part thereof and is hereby expressly declared to be imposed for revenue. The Township Committee may revoke any such license for sufficient cause after notice and hearing.

4. If perishable goods are stored at said licensed premises, said place or premises and the manner and conduct of said business shall in all respects comply with any and all health regulations required by any Federal, State or Municipal health authority.

5. Such licensed place or premises shall at all times comply with all proper police and fire regulations imposed by the Township Police and Fire authorities.

[fol. 15] 6. Said business and the place and premises where conducted shall be subject to reasonable inspection by the Police, Fire and Health authorities of the Township of Saddle River. It shall be the duty of the Chief of the Fire Department to immediately report in writing to the Township Committee the storage of any inflammable or combustible matter in or at any place or premises licensed hereunder. Said report shall also include the specific character and quantities of such material.

7. Any person, firm or corporation who shall violate any term or provision of this ordinance shall upon conviction thereof be subject to imprisonment in the County Jail or in

any place provided by the Township of Saddle River for the detention of prisoners, for a term not exceeding ninety (90) days or to a fine not exceeding Two Hundred Dollars ($200.00), or both. Any person so convicted may, in the discretion of the Magistrate by whom he was convicted, in default of the payment of any fine be imprisoned in the County Jail or place of detention provided by the Township of Saddle River, for any term not exceeding ninety (90) days. There may issue out of the court of any Magistrate empowered to impose fines for the violation of this ordinance execution against the goods and chattels of any person, firm or corporation convicted in such court or before such Magistrate. Execution shall be levied and enforced in the same manner as are executions from the small cause court. Each day that a violation of any of the terms or provisions of this ordinance shall continue shall constitute a separate offense.

[fol. 16] 8. In the event that any section or part of this ordinance shall be held illegal or unconstitutional such invalidity shall not be construed as impairing the force and effect of the remainder of the ordinance.

9. All ordinances or parts of ordinances inconsistent with this ordinance are hereby repealed as to such inconsistent provisions and this ordinance shall take effect after publication in the manner provided by law.

[fol. 17] MOTION TO DISMISS COMPLAINT

RECORDER'S COURT

TOWNSHIP OF SADDLE RIVER

BERGEN COUNTY, NEW JERSEY

On Complaints for violation of ordinance entitled "An Ordinance to regulate and license the business of the storage of personal property in warehouses engaged in the business of storing goods for hire and the place or premises in or at which said business is conducted and carried on, to prescribe fees for such licenses, and to provide penalties for the Violation of this Ordinance."

CHARLES IMPERATO, Chief of Police of the Township of Saddle River, Bergen County, Complainant

vs.

INDEPENDENT WAREHOUSES, INC., a corporation of the State of New York, Defendant

CHARLES IMPERATO, Chief of Police of the Township of Saddle River, Bergen County, Complainant,

vs.

JAMES THOMPSON, Defendant.

The defendant, Independent Warehouses, Inc., a corporation of the State of New York, moves to dismiss the complaint against it on the following grounds:

1. The ordinance upon which the complaint is based is not [fol. 18] a valid exercise of any licensing power of the Township of Saddle River, but is a devise to obtain public revenue from the storage of coal in the Township in a particular instance, in lieu of personal taxes on the coal stored which is exempted from taxation by law.

2. The total ground area of the place and premises in the Township of Saddle River in or at which Independent Warehouses, Inc. conducts or carries on the business of storing coal for hire, is 67.25 acres or 2,929,410 square feet and the annual license fee required to be paid by that com-

pany, computed on that area at the rate of three-quarters of a cent for each square foot, as prescribed by said ordinance, amounts to over $20,000. Such license fee is greatly in excess of any total annual earnings that Independent Warehouses, Inc. could obtain from the business of the storage of coal on said premises, and the annual license fee is arbitrary, unreasonable, prohibitory and confiscatory.

3. The business of storing coal for hire by Independent Warehouses, Inc. at the above mentioned place or premises in the Township of Saddle River, consists of the storage of coal shipped from coal mines outside of the State of New Jersey over the railroad of the Erie Railroad Company, an interstate carrier by steam railroad, under joint tariffs filed by it and other railroad companies with the Interstate Commerce Commission of the United States, which provide for the transportation of the coal to and from the above mentioned coal storage plant used by Independent Warehouses, Inc., for the purpose of its business, under through rates from the point of origin of the shipment to the ulti- [fol. 19] mate destination of the coal, the handling of the coal into and out of the coal storage plant and for storage of the coal therein. The coal stored at said coal storage plant is in the course of transportation in interstate commerce. The license fee required by the aforesaid licensing ordinance of the Township of Saddle River is unreasonable, arbitrary and prohibitory and imposes taxes, regulations, restrictions and burdens upon interstate commerce.

4. Said ordinance purports to be for the purpose of licensing the business of storing personal property for hire in the Township of Saddle River, but erroneously imposes penalties upon persons, firms and corporations who work in, occupy or, directly, or indirectly in any manner whatsoever utilize any place or premises in which such business is carried on unless and until a license under the ordinance has been granted by the Township, notwithstanding such persons, firms and corporations are not engaged in conducting or carrying on the business and are not responsible therefor.

5. The ordinance was passed by the Township Committee of the Township of Saddle River on January 25, 1943, and provides for an annual license fee, payable in advance and that the license shall expire on January first of each

year. Therefore, no license is required by the ordinance for any period prior to January 1, 1944.

6. Said ordinance deprives Independent Warehouses, Inc. of its property without due process of law and denies it the equal protection of the laws in violation of the Fourteenth Amendment to the Constittuion of the United States, [fol. 20] and imposes taxes, regulations, restrictions and burdens upon interstate commerce in violation of the commerce clause of the Constitution of the United States and the acts of Congress to regulate commerce.

7. Said ordinance is, for the reasons above stated, or one or more of them, and in other respects, irregular, defective, unlawful, unconstitutional and illegal.

The defendant James Thompson moves to dismiss the complaint against him on the grounds above stated and on the further ground that on the date mentioned in the complaint he was not responsible for conducting or carrying on the business of the storage of personal property in a warehouse for hire in the Township of Saddle River and can not be lawfully charged with a violation of the aforesaid licensing ordinance of the Township.

Dated November 30, 1943.

Collins & Corbin, Attorneys for and of Counsel with Independent Warehouses, Inc. and James Thompson, Defendants.

[fol. 21] IN SUPREME COURT OF NEW JERSEY

RETURN TO WRIT OF PROSECUTOR, JAMES THOMPSON—Filed December 30, 1943

The Return to the writ allowed the Prosecutor James Thompson, is the same except that:

(a) His violation is alleged to have occurred, and he was convicted for violation, on April 14, 1943.

(b) He is alleged to have "worked in, occupied or utilized" said place or premises, namely Block 106-D, and was convicted accordingly.

(c) His certificate of "conviction" contains the following stipulation:

> "Counsel for defendant stipulated that the evidence adduced in the trial on the same date herewith of the complaint against Independent Warehouses, Inc. together with the same objections and motions should comprise the evidence on the trial of the defendant, James Thompson."

(d) The Recorder stated that in default of the payment of the fine, Thompson "shall be imprisoned in the County Jail for a term of ninety *days* (90) days" instead of providing that execution against the goods and chattels might issue.

[fol. 22] IN SUPREME COURT OF NEW JERSEY

REASONS OF PROSECUTORS—Filed January 10, 1944

The prosecutors, and each of them, present the following reasons for reversing and setting aside the proceedings and judgments of conviction brought before this honorable court by the writ of certiorari in the above entitled cause:

1. The proceedings and judgments of conviction are based upon an alleged violation by the prosecutors, Independent Warehouses, Inc., and James Thompson, respectively, of an ordinance of the defendant, Township of Saddle River, entitled "An Ordinance to regulate and license the business of the storage of personal property in warehouses engaged in the business of storing goods for hire and the place or premises in or at which said business is conducted and carried on, to prescribe fees for said licenses, and to provide penalties for the violation of this ordinance," which ordinance is invalid, unlawful, unconstitutional and illegal, in this instance, because

> (a) The ordinance is not a valid exercise by the Township of Saddle River of any licensing power or authority it may have, but is a device of the Township to obtain public revenue from the prosecutors, or one or some of them, in lieu of personal taxes on certain coal stored in the Township which is exempted by law from taxation.

(b) The license fee prescribed by the ordinance is arbitrary, unreasonable and prohibitory and deprives the prosecutors, and each of them, of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and the Constitution and laws of New Jersey.

[fol. 23] (c) The ordinance, in effect, provides for a tax upon the property of the prosecutors, and each of them, and denies them the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

(d) The ordinance requires the obtaining of a license and the prepayment of license fee as a condition precedent to the right of prosecutors, or one or some of them, to conduct an instrument of transportation service in interstate commerce, in violation of the Commerce Clause of the Constitution of the United States and the Act of Congress to regulate commerce.

(e) The ordinance imposes taxes, regulations, instructions and burdens upon interstate commerce in violation of the Commerce Clause of the Constitution of the United States and the Act of Congress to regulate commerce.

(f) The ordinance takes the private property of the prosecutors, and each of them, for public use without just compensation, in violation of Article I, paragraph 16 of the Constitution of the State of New Jersey.

(g) The ordinance imposes excessive fines and penalties and inflicts unusual punishments, in violation of Article I, paragraph 15, of the Constitution of the State of New Jersey.

(h) The ordinance, in effect, imposes a tax upon property in violation of Article IV, Section VII, paragraph 12 of the Constitution of the State of New Jersey, [fol. 24] which provides that property shall be assessed for taxes under general laws, and by uniform rules, according to its true value.

(i) The ordinance is unreasonable and invalid because it confers discretionary power in the governing body of the Township of Saddle River to grant or re-

voke licenses without specifying uniform rules and regulations to apply to all applicants or licensees.

(j) The ordinance is not within any licensing power of the Township of Saddle River or authorized by law.

(k) The ordinance denies to prosecutors and each of them, the enjoyment of liberty, to acquire and possess property, and to pursue and obtain safety and happiness, in violation of the Constitution and laws of New Jersey.

(l) The ordinance denies to prosecutors and each of them, their privileges and immunities as citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States.

(m) The ordinance is indefinite and uncertain among other things, as to the amount of license fees and fines and penalties for violations of the ordinance.

(n) The ordinance was passed by the Township Committee of the Township of Saddle River on January 25, 1943, and provides for an annual license fee, payable in advance and that the license shall expire on January first of each year. No license is required by the ordinance for any period prior to January 1, 1944.

[fol. 25] 2. The ordinance, proceedings and judgments of conviction and the statutes upon which they are based, are for the reasons above stated, or one or more of them, and in other respects, invalid, unlawful, unconstitutional and illegal.

Collins & Corbin, Attorneys of Prosecutors, Independent Warehouses, Inc. and James Thompson, Hobart, Minard & Cooper, Attorneys of Prosecutor, Pennsylvania Coal Company and Erie Railroad Company.

IN SUPREME COURT OF NEW JERSEY

STIPULATION FOR JOINT RECORD—Filed April 22, 1944

It is hereby stipulated that the proceeding on the writs of certiorari in the above entitled cases, respectively, be

presented to the court in one joint record, and that, with the court's approval, they be briefed and heard together.

Signed by attorneys for all prosecutors and defendants March 22, 1944.

[fol. 26] IN SUPREME COURT OF NEW JERSEY

Statement of Evidence

EXHIBIT P-2.

Coalberg Licensing Ordinance — March 17, 1944

Coalberg Storage Plant (67.25 acres) 1943
Land and Improvement Assessments, Areas, Uses and Taxes

(1) Area Sq. Ft. Land	(2) Rate per Sq. Ft. Land	Assessed Valuation (3) Total Land	Occupancy and Use—Sq. Ft. of Land (4) Railroad Tracks	(5) Storage Plant	(6) Unoccupied	(7) License Fee ¾¢ Sq. Ft.
		*Block 106–D (containing all tracks and improvements).				
1,365,148	1¢	$13,651	462,350	1,198,500	1,068,750	$20,475 00
1,365,148	½¢	6,824				
Improvements		$113,400				
			Block 106–E			
90,910	½¢	455			90 910	682 50
			Block 102, Lot 1			
108,900	¾¢	817			108,900	817 00
2,929,410 (Land)		$21,747	462,350	1,198,500	1,268,560	$21,974 50
(Improvements)		113,400				
(Total)		$135,147				
Taxes levied		7,770 98				

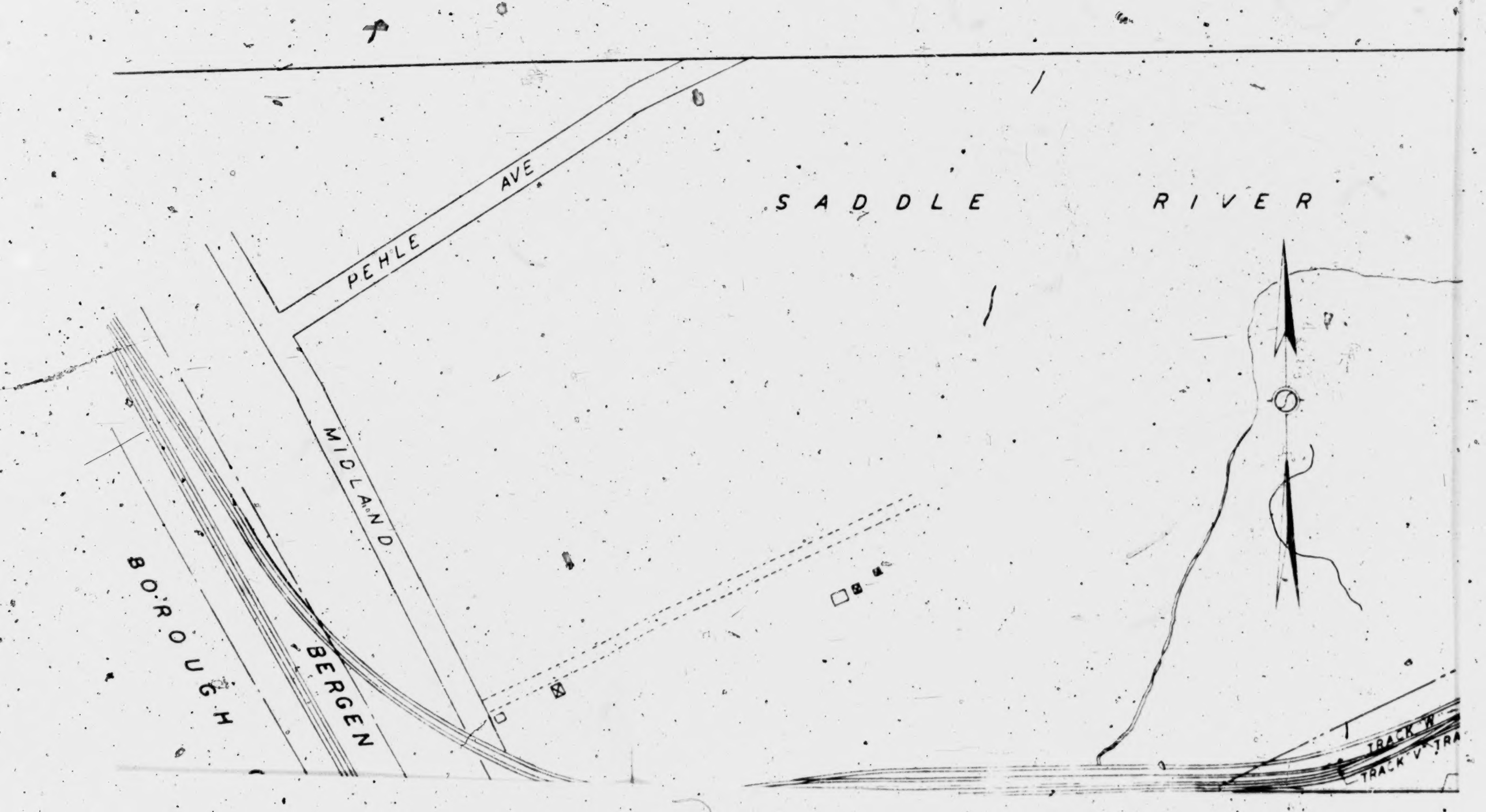
* Complaint designation of place of violation of Ordinance.

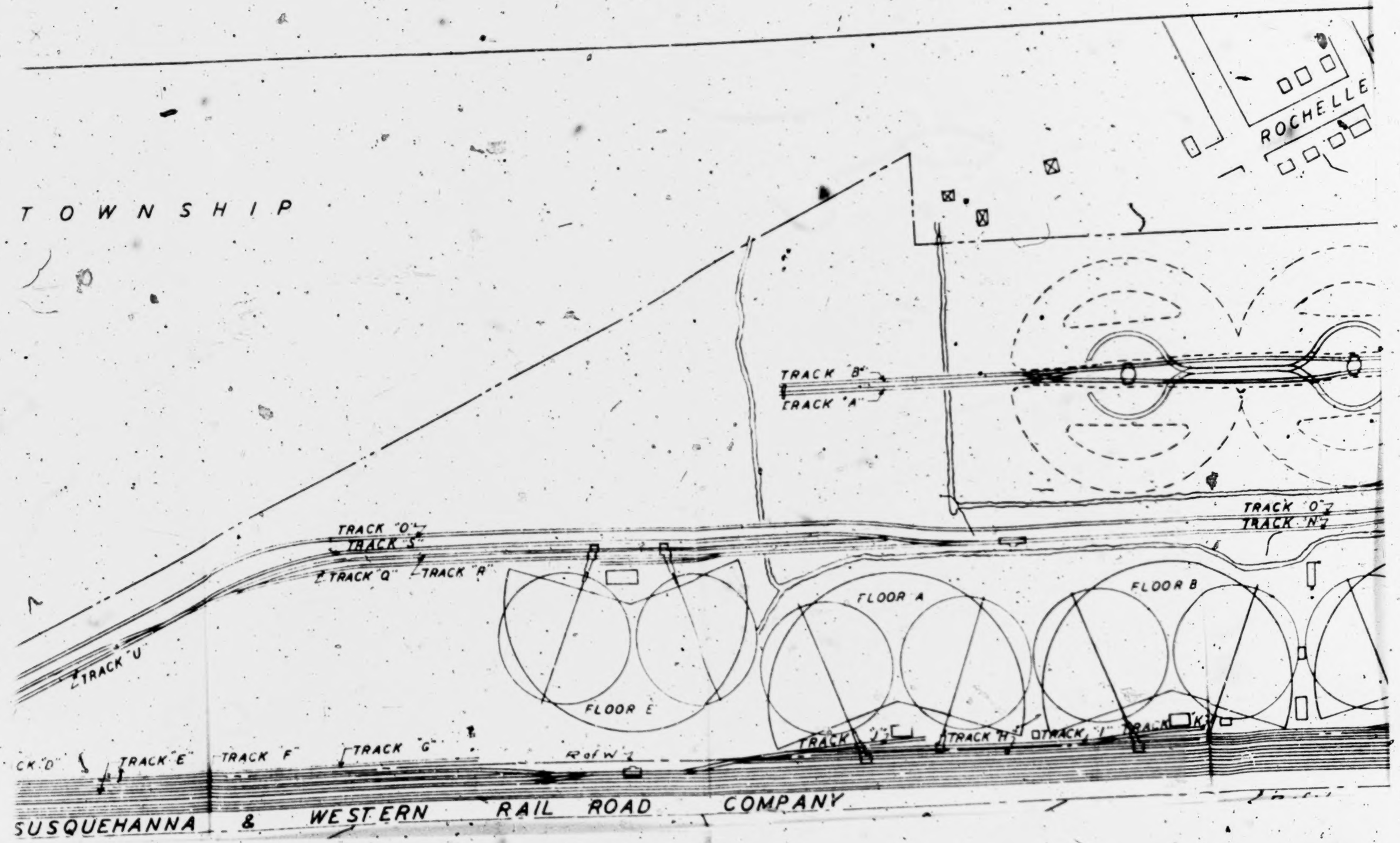
Land Distribution of Track Occupancy (all in Blk. 106–D)

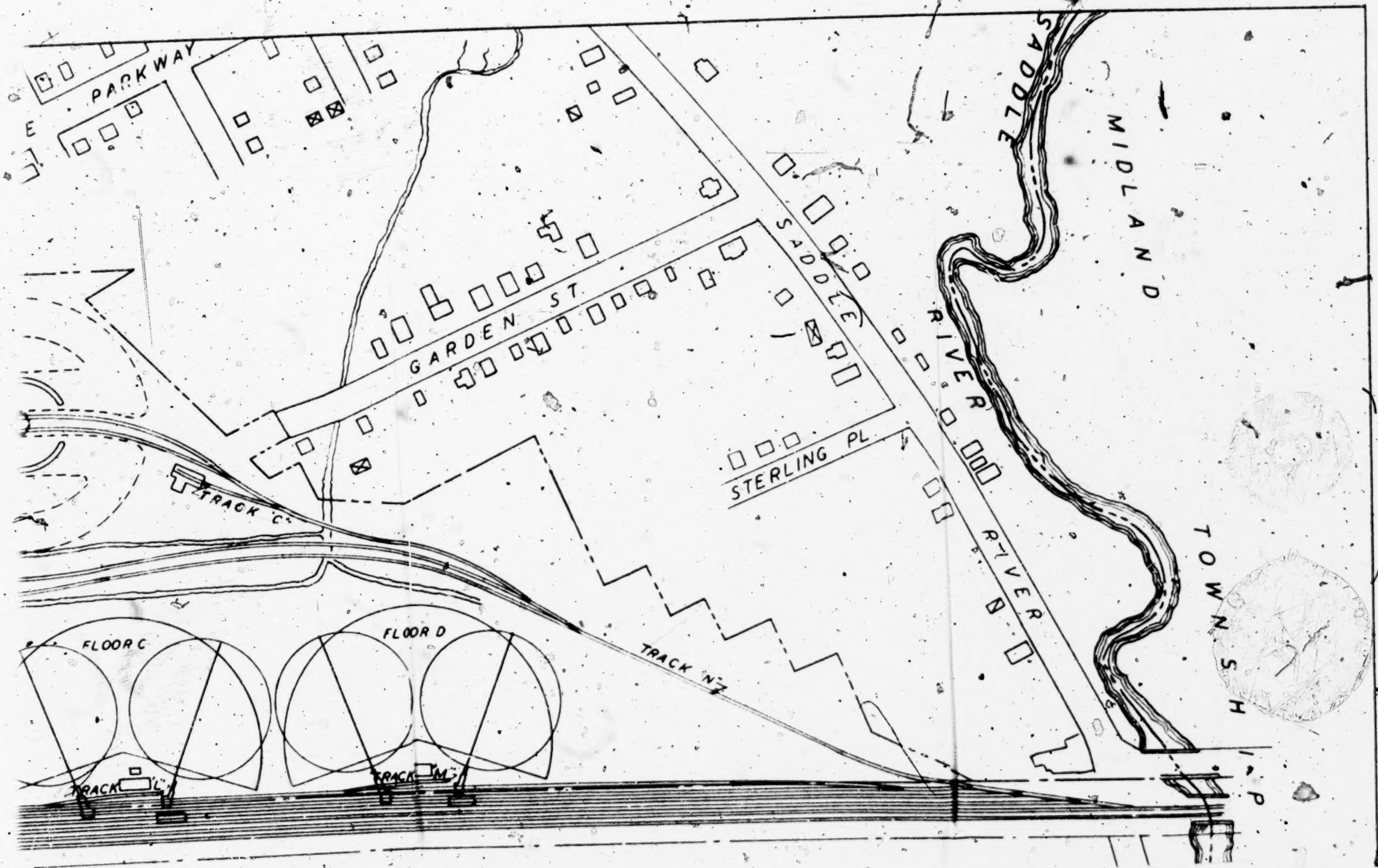
Use	(1) Sq. Ft. Area	(2) Lineal Feet	(3) License Fee ¾c. Sq. Ft.
Storage Plant (Primary)	107,240	5,047	$804.30
N. Y. S. & W. Railroad Exclusive	188,055	7,525	1,410.41
Joint—Plant & N. Y. S. & W.	167,055	9,060	1,252.91
N. Y. S. & W. Over-all Trackage Rights			
	462,350	21,632	$3,467.62

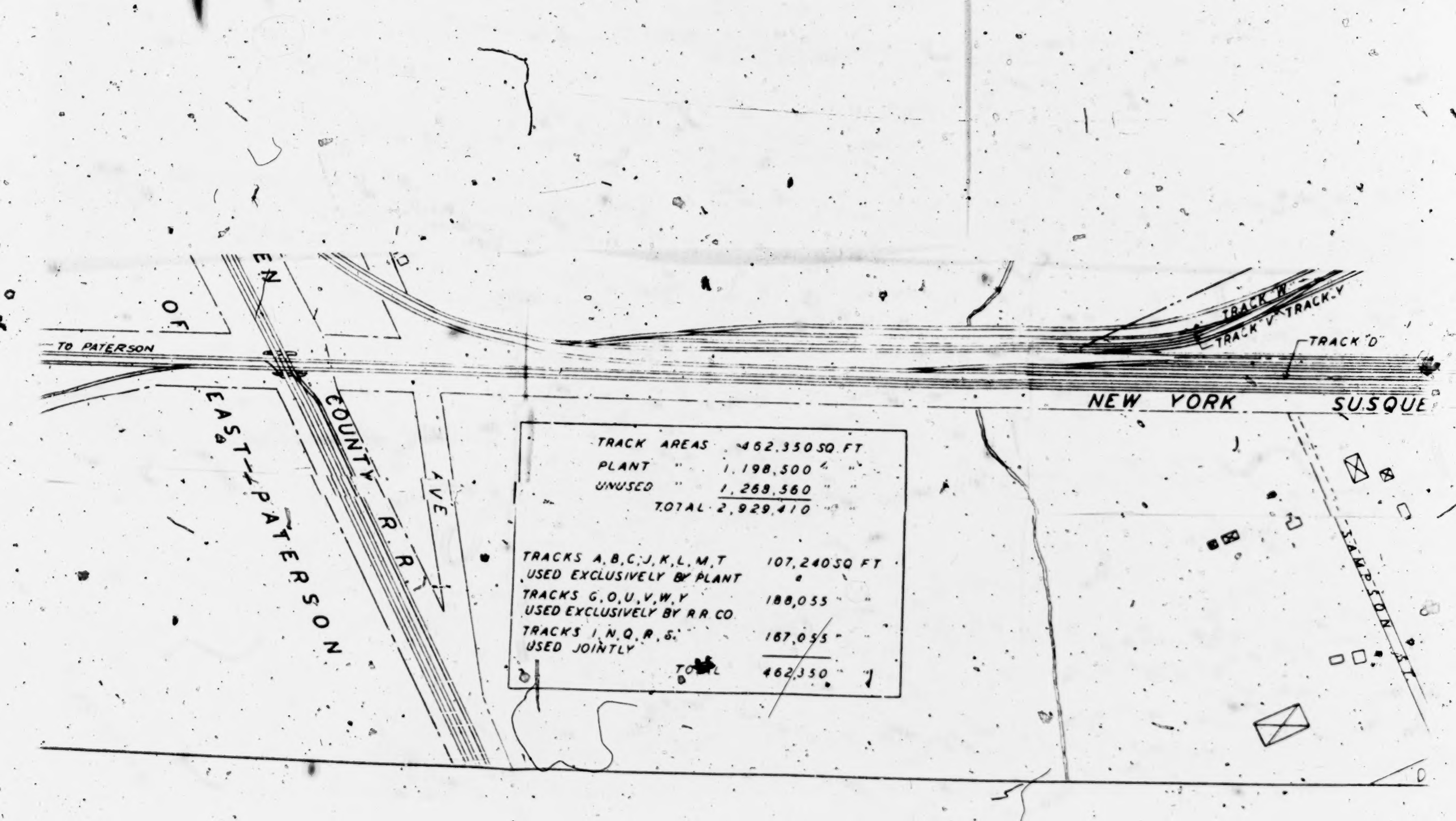
F. J. Brust.

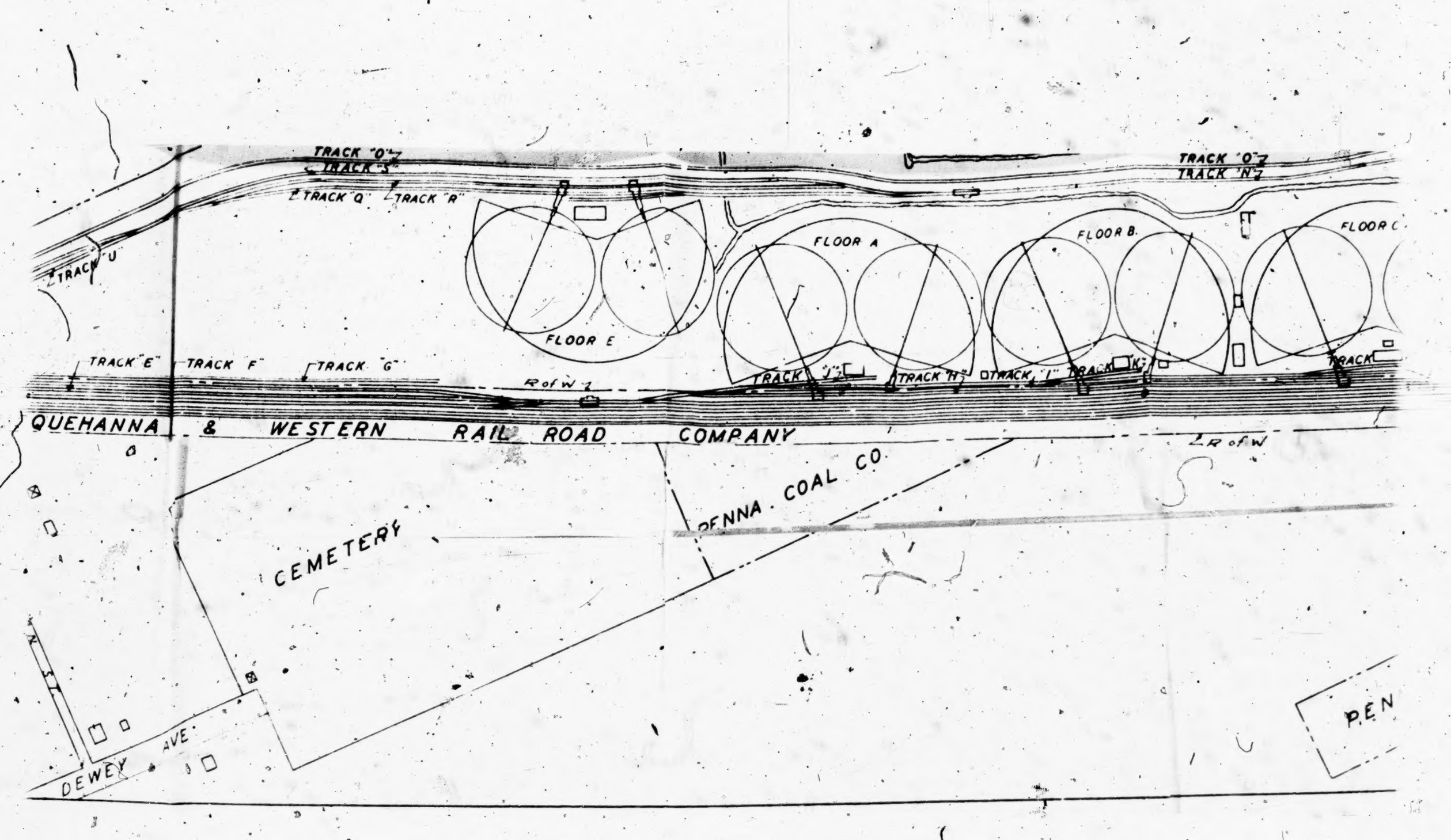
(Here follows 1 photolithograph, side folio 26a)


PEHLE AVE
MIDLAND
BERGEN
BOROUGH
SADDLE RIVER
TRACK W
TRACK V


ROCHELLE
TOWNSHIP
TRACK "B"
TRACK "A"
TRACK "O"
TRACK "S"
TRACK "Q"
TRACK "R"
TRACK "N"
TRACK "U"
FLOOR A
FLOOR B
FLOOR E
TRACK "D"
TRACK "E"
TRACK "F"
TRACK "G"
R of W
TRACK "J"
TRACK "H"
TRACK "I"
TRACK "K"
SUSQUEHANNA & WESTERN RAIL ROAD COMPANY


E. PARKWAY
GARDEN ST
SADDLE
STERLING PL
RIVER
RIVER
SADDLE
MIDLAND
TOWNSHIP
TRACK 'C'
TRACK 'N'
FLOOR C
FLOOR D
TRACK 'L'
TRACK 'M'


TO PATERSON
EAST PATERSON
COUNTY R.R.
AVE
TRACK W
TRACK V
TRACK Y
TRACK "D"
NEW YORK
SUSQUE
SAMPSON AVE
TRACK AREAS 462,350 SQ FT
PLANT " 1,198,500 " "
UNUSED " 1,268,560 " "
TOTAL 2,929,410 " "
TRACKS A,B,C,J,K,L,M,T USED EXCLUSIVELY BY PLANT 107,240 SQ FT
TRACKS G,O,U,V,W,Y USED EXCLUSIVELY BY R R CO 188,055 " "
TRACKS I,N,Q,R,S, USED JOINTLY 167,055 " "
TOTAL 462,350 " "


TRACK "O"
TRACK "S"
TRACK "Q"
TRACK "R"
TRACK "O"
TRACK "N"
TRACK "U"
FLOOR E
FLOOR A
FLOOR B.
FLOOR C
TRACK "E"
TRACK F"
TRACK "G"
R of W
TRACK "J"
TRACK "H"
TRACK "I"
TRACK "K"
TRACK
QUEHANNA & WESTERN RAIL ROAD COMPANY
L R of W
QUEHANNA COAL CO
CEMETERY
DEWEY AVE
P.E.N

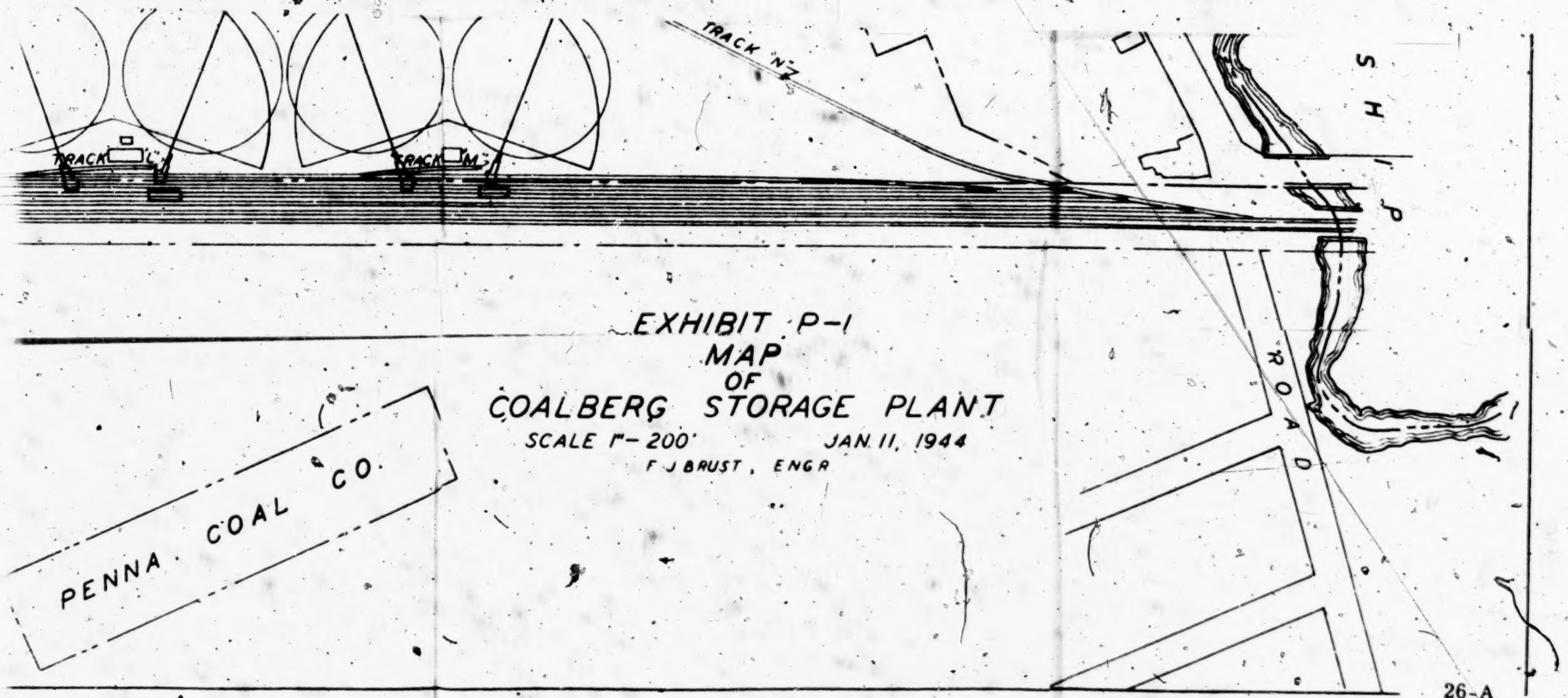


EXHIBIT P-1
MAP
OF
COALBERG STORAGE PLANT
SCALE 1"-200' JAN. 11, 1944
F. J. BRUST, ENGR

{fol. 27}

EXHIBIT P-3

Coalberg, N. J. 1/6/44

Track Areas

Tracks used by Storage Plant: "A", "B" and "C".			88,600 Sq. ft.
	550′ x 47′ — 25,850		
	500′ x 60′ — 30,000		
	355′ x 50′ — 17,750		
	300′ x 20′ — 6,000		
	300′ x 30′ — 9,000		
	2005′	88,600	
Track "J"		270′ x 12′	3,240 "
" "K"		250′ x 12′	3,000 "
" "L"		250′ x 12′	3,000 "
" "M"		250′ x 12′	3,000 "
" "T"		320′ x 20′	6,400 "
		Total	107,240 "
Tracks used exclusively by N. Y. S. & W. Railroad Co.:			
Track "G"		1360′ x 25′	34,000 "
" "O"		3990′ x 30′	119,700 "
" "U"		510′ x 18′	9,180 "
" "V"		395′ x 10′	3,950 "
" "W"		775′ x 21′	16,275 "
" "Y"		495′ x 10′	4,950 "
		Total	188,055 "
Tracks used jointly by N. Y. S. & W., and Storage Plant:			
Track "I"		2320′ x 13′	30,160 "
" "N"		{700′ x 30′ — 21,000 900′ x 20′ — 18,000 795′ x 30′ — 23,850}	62,850 "
		2395′	
Track "Q"		1505′ x 20′	30,100 "
Track "R"		1435′ x 13′	18,655 "
Track "S"		1405′ x 18′	25,290 "
		Total	167,055 "

N. Y. S. & W., entitled to use all tracks for railroad purposes.

Note: Track "P" removed.
N Y. S. & W. R. R. Co. may use all tracks.
See. Agr. 7/30/31 page 4 "Other uses. Fifth."

[fol. 28] Coalberg Licensing Ordinance.

Comparison of Saddle River Township 1943 Statistics, and Coalberg Valuations, Taxes and License Fee

Pop. 3,169

Items	Land Valuation	Improvements Valuation	Township Operating Cost	Township Budget	Taxes
Township Ratables	$867,935	$2,080,414	$59,277 00	$260,987 98	
Coalberg Valuations	21,747	113,400			
Coalberg					7,770 96
Coalberg Percentage	2 62	5 45	13 11	3 0	
License fee			37 0 %	8 4%	21,970 57
Coalberg Total			50 11%	11 4%	$29,741 53
Tax rate	5 75				
Consumption of capital value 17.4 years					
Maximum license fee capitalized at 5.75%			$382,097.00		

Sources:

(a) Land & Improvement valuations, abstract of Ratables &c. in Bergen County for 1943, Bergen Co., Board of Taxation.

(b) Operating cost and budget, Financial Statistics of N. J. Municipalities, N. J. Taxpayers' Assn., Nov. 1943.

D.E.M.
1/26/44.

[fol. 29] EXHIBIT P-4

This Agreement, made in duplicate this 10th day of July, A. D. 1939, by and between

Pennsylvania Coal Company, a Corporation organized and existing under the laws of the Commonwealth of Pennsylvania, hereinafter called "Pennsylvania Company," party of the first part, and

C. E. Denny and John A. Hadden, Trustees of the property of Erie Railroad Company, hereinafter called "Trustees," parties of the second part.

Whereas, Pennsylvania Company is the owner in fee of certain tracts of land comprising approximately 67¼ acres situate in the Township of Saddle River, County of Bergen, State of New Jersey, upon which has been erected certain improvements and on which have been installed machinery, equipment, tracks, scales and other personal property, all owned by said Pennsylvania Company designed for use, and heretofore used as an anthracite coal storage yard and known as "Coalberg," and

Whereas, the said Coalberg Yard has been in possession of The Pittston Company, a Delaware Corporation, and its subsidiary Pattison & Bowns, Inc., a New York Corporation, for the storage therein of coal mined and prepared by The Pittston Company at its several mines located in the State of Pennsylvania heretofore operated by it under lease from Pennsylvania Company dated as of the first day of January, 1930, covering not only said coal mines and collieries but also said Coalberg Storage Yard, and [fol. 30] Whereas, by agreement between The Pittston Company and Pennsylvania Coal Company dated the 7th day of December, 1938, sometimes known as "Interim Agreement," the actual possession of Coalberg Storage Yard was surrendered by The Pittston Company and its sublessee, Pattison & Bowns, Inc., to Pennsylvania Coal Company as of December 1, 1938 and it was agreed by and between the parties that as of August 1st, Pennsylvania Coal Company would assume the cost and expense of operating the said Yard as set forth in a "Statement of Adjustments" attached to and made a part of the said Interim Agreement; and by agreement dated the 17th day of April, 1939, effective retroactively as of the first day of August, 1938, between The Pittston Company and the Pennsylvania Coal Company, the heretofore recited lease from Pennsylvania Coal Company to The Pittston Company covering the Lessor's coal mines and collieries located in the State of Pennsylvania and also the Coalberg Storage Yard were formally cancelled and terminated, and .

Whereas, by reason of the substantially lesser number of collieries which Pennsylvania Company is now operating as compared with the number of collieries it formerly operated, because of changes in marketing conditions and because Pennsylvania Company now and for some time past has been selling all its prepared coal as loaded in cars at the mines, said Pennsylvania Coal Company has no need for and does not desire to use its said Coalberg Storage Yard; and said Coalberg Storage Yard is of use and benefit to the Trustees in order that they may have facilities for the storage of prepared anthracite coal for shippers on Erie [fol. 31] lines whereon said Coalberg Storage Yard is located so that shipments of coal may not be diverted to other and competing lines on which facilities for coal storage are available; therefore it has been agreed by and between the parties hereto that Pennsylvania Company shall oper te

said Coalberg Storage Yard for and on behalf of said Trustees as hereinafter set forth.

Now, therefore, for and in consideration of the facts as hereinabove set forth, as well as the sum of One Dollar ($1.00) by each of the parties to the other in hand paid, receipt whereof is hereby acknowledged, as well as other good and valuable considerations, the parties hereto agree as follows, to wit:

1. That effective as of February 25, 1939, Pennsylvania Coal Company has operated and shall hereafter continue to operate its Coalberg Storage Yard located in the said Township of Saddle River, County of Bergen and State of New Jersey, for the benefit and on behalf of C. E. Denney and John A. Hadden, Trustees of the property of Erie Railroad Company, herein called "Trustees."

2. That the said Coalberg Storage Yard will be operated as a public service facility for shippers of prepared anthracite coal on Erie lines desiring storage space in accordance with and under the rates named in a certain Tariff on file with the Interstate Commerce Commission and the Public Utilities Commission of the State of New Jersey, iss-ed January 24, 1939 and effective as of the 25th day of February, 1939, and designated as I. C. C. No. D-1390; P. U. C.-N. J. No. 206; Erie Railroad Company Tariff No. G O 2213-F; New York, Susquehanna & Western R. R. Co. Tariff [fol. 32] No. S. W. 5447; Wilkes-Barre & Eastern R. R. Co. Tariff No. W. E. 1610-E, and any supplements thereto, which said Tariff is by reference made a part hereof.

3. The Trustees will maintain an agent at said Coalberg Storage Yard who shall be duly authorized on their behalf to issue warehouse receipts for coal placed in storage in said Yard for storage by shippers, and other than this agent, all others employed in and about Coalberg Storage Yard will be employed by Pennsylvania Company.

4. On or before the 20th day of each month, Pennsylvania Company will render unto the Trustees a statement of income and expenses which may be verified from the books of Pennsylvania Company at all reasonable times by proper representatives of the Trustees and said Trustees will thereupon on or before the end of the calendar month, reimburse Pennsylvania Company for the net loss, if any, or the Pennsylvania Company will remit to the Trustees

the net surplus, if any, resulting from the operation of said Storage Yard during the previous calendar month.

Included in the allowable items of expense chargeable against the operation and maintenance of the said Coalberg Storage Yard on the part of the Pennsylvania Company shall be such items as taxes, insurance, Workmen's Compensation costs, payroll and unemployment insurance taxes, maintenance of equipment and facilities, and a proportionate part of the wages or salaries and expenses of employees and officers of Pennsylvania Company, not regularly employed at the Coalberg Storage Yard, computed on the basis of the time actually spent on matters pertaining to said Storage Yard, but not excluding by this specific enumera- [fol. 33] tion any other items of expense which properly should be chargeable as an expense of operation and maintenance of said Coalberg Storage Yard.

5. All coal on hand at said Coalberg Storage Yard as of December 1, 1938, purchased by Pattison & Bowns, Inc. from The Pittston Company has been reloaded into cars without charge to expense of operation of the plant to the extent that such coal was reloaded on or before March 31st, 1939, in accordance with the provisions of agreement between Pennsylvania Coal Company and The Pittston Company ("8" paragraph) dated the 7th day of December, 1938, sometimes known as "Interim Agreement."

6. This agreement may be cancelled at any time by either party hereto upon sixty days' notice to the other in writing.

7. All records, books of account and other data of Pennsylvania Company relating to its operation of said Coalberg Storage Yard, shall be at all times open to the inspection of proper representatives of the Trustees.

8. The Trustees shall reimburse Pennsylvania Company and indemnify said Pennsylvania Company against all claims and demands and all suits, actions and causes of action brought thereon by or on behalf of any and all persons, including firms and corporations, which may arise or grow out of the operation of said Coalberg Storage Yard by Pennsylvania Company from and after February 25, 1939, and anything done or omitted to be done by it or on its behalf in connection therewith or in consequence thereof, except such claims and demands as may arise

[fol. 34] as the result of malfeasance of the employees or officers of Pennsylvania Company.

In witness whereof, Pennsylvania Company has caused this agreement to be signed by its President, with its corporate seal attached hereto, attested by its Secretary, and the Trustees have hereunto set their hands the day and year first above written.

Pennsylvania Coal Company, by L. L. White, President.

Attest:

F. V. Lynn, Asst. Secretary. C. E. Denney and John A. Hadden, Trustees of the property of Erie Railroad Company, by R. E. Woodruff, Vice President.

EXHIBIT P-5

Lease

Agreement made this 20th day of June, 1939, between Pennsylvania Coal Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania (hereinafter called "Lessor") and Independent Warehouses, Inc., a corporation organized and existing under the laws of the State of New York, having its principle office at No. 415 Greenwich Street, City and State of New York, (hereinafter called "Lessee").

[fol. 35] Witnesseth:

First. The Lessor has agreed to let and hereby does let, and the Lessee has agreed to take and hereby does take, the following premises:

All the lands, tenements and hereditaments in the township of Saddle River, County of Bergen and State of New Jersey, included in the coal storage yard owned by the Lessor known as Coalberg, New Jersey, together with all trimmers in said coal yard; which premises the Lessor represents are owned by it and suitable for use as a warehouse for the storage of coal for the term of one (1) year beginning June 20, 1939, and ending on June 19, 1940, and for such further period of time during which any agreement or agreements heretofore or hereafter en-

tered into, either between the parties hereto, or between the Lessee and any third person, firm, corporation, company or association, covering the warehousing of certain coal located upon the leased premises, may be outstanding, unfulfilled and uncompleted; provided, however, that this lease shall not terminate until such time as all negotiable and non-negotiable warehouse receipts outstanding issued by the Lessee to any person, firm, company or association, shall have been surrendered to the Lessee.

The Lessee agrees to pay the Lessor the sum of One Dollar ($1.00) and other good and valuable consideration, as and for the rent of said premises, the receipt whereof is hereby acknowledged by the Lessor.

To have and to hold the said premises, with the appurtenances unto the Lessee, together with the right to place and maintain such signs and marks thereon, or on the [fol. 36] property stored thereon, as may be necessary to indicate the proprietorship of the said Lessee, and the paramount right at all times during the continuance of this lease to employ any facilities which may be necessary and proper to carry on the business of the Lessee on the leased premises.

Second. The Lessor hereby warrants that the title to the premises described herein and all property contained upon said premises is fully vested in it.

Third. The Lessor hereby gives the Lessee permission, power and authority to receive and hold as a general public warehouseman on storage in the said warehouse any and all types of coal that may be lawfully tendered to said Lessee by any person, firm, corporation, company or association for storage, upon any terms deemed proper by the Lessee, and to issue therefor the Lessee's warehouse receipts in the usual customary form, or as required by law.

Fourth. It is further agreed that the Lessor shall furnish all material and labor and bear all expenses of keeping and maintaining said premises in good order and repair, and shall not in any manner interfere with the full and exclusive occupancy, possession and control of the leased premises and the contents thereof by the Lessee, and shall not authorize or permit any of its officers, agents or employees to enter the leased premises or in any manner,

directly or indirectly to remove or tamper with any of the property stored upon said premises by said Lessee.

Fifth. That the Lessee shall not, without the consent of the Lessor, for all or any part of the term hereby [fol. 37] granted, sublet the said premises or occupy or use the same in any other manner than for storage purposes and for the transaction of such business as need be connected therewith or incident thereto and for the transaction of the business of a general public warehouseman.

Sixth. Should the Lessor violate any of the terms or conditions of this lease, or in any manner interfere with or make difficult the duties of the Lessee, its agents, servants, or employees, or become insolvent; or should the premises hereby leased become involved in litigation; or should the Lessor or Lessee be ejected or ousted therefrom, or proceedings be taken for that purpose; or should the Lessee at any time deem it necessary for the protection of its interest or of the property stored; then, and in all of such events, the Lessee shall have the right to remove all property from the premises herein described to such other place or places as the Lessee may deem proper or expedient and in case of any such removal, the Lessor agrees to pay to the Lessee all expenses of such removal and of storing said property elsewhere, until the property so stored shall be released on surrender of any receipts therefor.

Seventh. The Lessor agrees to execute or cause to be executed any further agreement or agreements that may be necessary to secure the continued use and enjoyment of the premises hereby leased.

Eighth. It is understood and agreed that notwithstanding this agreement is for the term of one year ending June 19th, 1940, that this Agreement may nevertheless be terminated by either party hereto on thirty (30) days written notice to the other part; provided, however, that the termination of said Agreement shall not be effective as long as [fol. 38] any Agreement or Agreements heretofore or hereafter entered into, either between the parties hereto, or between the Lessee and any third person, firm, corporation, company or association, covering the warehousing of certain coal located upon the leased premises, may be outstanding, unfulfilled and uncompleted, or as long as any negotiable or

non-negotiable warehouse receipts issued by the Lessee to any person, firm, company or association are still outstanding and surrendered.

In witness whereof, the parties hereto have executed this Agreement in duplicate the day and year first above written.

Pennsylvania Coal Company (Sgd.) H. J. Connolly, Vice President.

Attest:

(Sgd) E. D. Adair, Secretary. Independent Warehouses, Inc. (Seal.) John T. McCormick, Vice President.

Attest: (Sgd.) L. J. Schulz, Secretary.

State of New York,
County of New York, ss:

On this 8th day of June, 1939, before me personally came J. T. McCormack, to me known, who, being by me duly sworn, did depose and say that he resides in Queens County, [fol. 39] New York, that he is the Vice-President of Independent Warehouses, Inc., the corporation described in and which executed the foreging instruments; that he knows the seal of said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

(Sgd.) James E. Reilly, Notary Public, Kings County. Kings Co. Clk's No. 103, Reg. No. 216; N. Y. Co. Clk's No. 224, Reg. No. SR-144. Commission expires March 30, 1940.

Commonwealth of Pennsylvania,
County of Lackawanna, ss:

I hereby certify that on this 9th day of July, in the year of Our Lord One Thousand Nine Hundred and Thirty-Nine, before me, the subscriber, a notary public, personally appeared H. J. Connolly, Vice President of Pennsylvania Coal Company, the attorney named in the foregoing lease, and by virtue and in pursuance of the authority therein con-

ferred upon him, acknowledged the said lease to be the act of said Pennsylvania Coal Company.

Witness my hand and my seal the day and year aforesaid.

(Sgd) James E. Hallock, Notary Public. (Seal.)

My Commission expires September 18, 1942.

[fol. 40] EXHIBIT P-6

This agreement, made this 20th day of June, 1939; between Pennsylvania Coal Company, a corporation organized and existing under the Laws of the Commonwealth of Pennsylvania (hereinafter called "Customer") and Independent Warehouses, Inc., a corporation organized and existing under the Laws of the State of New York, having its principal office at 415 Greenwich Street, City and State of New York (hereinafter called the "Warehouse Company").

Whereas, the Customer owns premises suitable for use as a warehouse for the storage of coal in the Township of Saddle River, County of Bergen and State of New Jersey; and

Whereas, it is the desire and for the interest of said Customer that said Warehouse Company shall acquire the exclusive control of said premises and conduct therein the general business of a warehouseman and receive, warehouse, hold and store coal therein and issue its warehouse receipts for such coal as shall be tendered by anyone to it as such general warehouseman, including coal owned by said Customer, and which said Customer shall deliver or cause to be delivered to said Warehouse Company for such purposes.

Now, therefore, This Agreement Witnesseth, that in consideration of the sum of Ten ($10.) Dollars paid by each of the parties hereto to the other, the receipt whereof is hereby acknowledged, and in consideration of the mutual promises and agreements made, it is agreed as follows:

First. The Customer has leased to the Warehouse Company, by lease dated June 20th, 1939, said premises suitable [fol. 41] for use as a warehouse for the storage of coal in the Township of Saddle River, County of Bergen and State of New Jersey. Said premises are hereinafter referred to

as "warehouse." This agreement hereby grants to the Warehouse Company exclusive and undisturbed possession and control of said warehouse with rights of free ingress and egress during and at all reasonable times, together with the right to place such signs and marks thereon, and on the property stored therein, as may be necessary to indicate that said warehouse is leased to the Warehouse Company, and is under its exclusive power, control and operation, and that it is conducting therein the business of a general warehouseman.

Second. It is understood and agreed that the Warehouse Company is entitled to receive and hold as a general public warehouseman on storage, in said warehouse any and all types of coal that may be lawfully tendered to it for storage, by any person, firm, corporation, company or association, and to issue therefor its warehouse receipts in the usual customary form, or as required by law.

Third. The Warehouse Company convenants that it will proceed diligently to carry out the purposes of this agreement, and that it will from time to time receive and hold as a warehouseman in the warehouse to be operated pursuant to this agreement, any and all types of coal that may be lawfully tendered to it for warehousing for the account or at the request of the Customer, provided that at the time of such tender of coal, the Warehouse Company shall have space and facilities in said warehouse in which it can store such coal as may be offered for storage.

[fol. 42] Fourth. The Customer agrees to pay or cause to be paid to the Warehouse Company the sum of two cents (02c) per ton for all coal, for which receipts are issued, which said Customer has placed or shall cause to be placed, or which shall remain in the possession or control of the Warehouse Company for one year from the date of the commencement of this agreement, or any part thereof. It is understood that the minimum amount payable by the Customer to the Warehouse Company for the period of one year, beginning June 20th, 1939, is Six Hundred ($600.) Dollars. Should this agreement continue in effect after June 19, 1940, the charge for the storage of coal will be the same as that during the previous term; it being understood that the minimum sum payable by the Customer to the Ware-

house Company hereunder will be Fifty ($50.) Dollars per month.

Fifth. The Customer hereby agrees to reimburse the Warehouse Company for any loss, costs, expenses or damages paid or incurred by the Warehouse Company in connection with the warehousing operations on the demised premises, including all attorney's fees, or other costs or expenses of litigation, but not including ordinary operating losses, costs or expenses of the Warehouse Company and not including any losses, costs, expenses or damages paid or incurred as a result of the gross negligence of the Warehouse Company or its employees or agents. To secure the liability of the Customer hereunder, the Customer does hereby grant and convey to the Warehouse Company a lien on all its coal stored with the Warehouse Company at the time any such loss, cost, expense or damage may be incurred. Said lien may be enforced in the same manner as the warehouseman's lien for storage or other charges is en-
[fol. 43] forced under the Laws of the Commonwealth of Pennsylvania.

Sixth. The Warehouse Company agrees to provide a warehouse manager to manage said warehouse. The Customer agrees to pay the Warehouse Company, monthly in advance, in addition to the consideration set forth in Clause "Fourth" of this agreement, an amount equal to the salary of said warehouse manager plus the premium on Workmen's Compensation Insurance covering said warehouse manager plus taxes and charges levied on said warehouse manager's salary as a result of Federal and State Unemployment Laws, Old Age Pensions and Annuity Legislation. The Customer agrees to provide from among its own employees such competent and experienced man or men as shall be reasonablely necessary or required by the Warehouse Company in order to perform all labor and properly to operate, warehouse, receive, handle and deliver the coal intended to be warehoused in pursuance of this agreement. It is distinctly understood, however, that such man or men provided by the Customer shall at all times be in the service and under the absolute control of the Warehouse Company while employed for such purpose. The Customer agrees to pay all taxes and charges levied or assessed upon payrolls of warehouse employees used in the operation of this agree-

ment, as a result of Federal and State Unemployment Laws, Old Age Pensions and Annuity Legislation, and to comply with the Laws of the Commonwealth of Pennsylvania for providing Workmen's Compensation Insurance for its employees used hereunder. It is understood that the delivery of coal to said warehouse and the transportation of coal from said warehouse shall be performed by the Customer.

[fol. 44] Seventh. The Customer agrees to execute or cause to be executed any further agreement or agreements that may be necessary to secure the continued use and enjoyment of said warehouse.

Eighth. This agreement shall terminate on the 19th day of June, 1940, except as to coal covered by outstanding negotiable or non-negotiable warehouse receipts issued by the Warehouse Company to the Customer, or to any person, firm, corporation, company or association, which have not been surrendered to the Warehouse Company. The obligations of the Warehouse Company shall be subject at all times to strikes, wars, internal disturbances, fires and conditions unavoidable and beyond its control. The rights and obligations of the parties hereto shall inure to the benefit of, and be binding upon, their respective successors and assigns.

In Witness Whereof, the parties hereto have caused these presents to be executed by their respective officers, in duplicate, the day and year first above written.

Pennsylvania Coal Company, A. J. Connolly, Vice-President.

Attest:

E. D. Adair, Secretary.

Independent Warehouses, Inc., John T. McCormack, Vice-President.

Attest: L. J. Schulz, Secretary.

[fol. 45] State of New York,
County of New York, ss:

On this 8th day of July, 1939, before me personally came J. T. McCormack, to me known, who, being by me duly sworn, did depose and say that he resides in Queens County, New York, that he is the Vice-President of Independent

Warehouses, Inc., the corporation described in and which executed the foregoing instrument; that he knows the seal of said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

JAMES E. REILLY.

COMMONWEALTH OF PENNSYLVANIA,
County of Lackawanna, ss:

I hereby certify that on this 9th day of July, in the year of Our Lord One Thousand Nine Hundred and Thirty-Nine, before me, the subscriber, a notary public, personally appeared H. J. Connolly, Vice-President of Pennsylvania Coal Company, the attorney named in the foregoing lease, and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said lease to be the act of said Pennsylvania Coal Company.

Winess my hand and my seal the day and year aforesaid.

JAMES E. HOLLOCK

[fol. 46] EXHIBIT P-7.

This Supplemental Agreement made and executed in duplicate this 24th day of May, 1940, by and between

Pennsylvania Coal Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, hereinafter called "Customer," and

Independent Warehouses, Inc., a corporation organized and existing under the laws of the State of New York and having its principal office at 415 Greenwich Street, City and State of New York, hereinafter called "Warehouse Company":

Whereas, by agreement of lease dated 20th day of June, 1939, by and between the parties hereto, the Customer as the owner of certain lands suitable for and used as a storage for anthracite coal, in the Township of Saddle River, County of Bergen and State of New Jersey, leased and demised the said lands to Company for a term of one (1) year beginning June 20, 1939 and ending June 19, 1940, "and for such further period of time during which any agreement or agreements heretofore or hereafter entered into either between the parties hereto or between the Lessee (Warehouse

Company) and any third person * * * covering the warehousing of certain coal located on the leased premises, may be outstanding, unfulfilled and uncompleted" and during such time as warehouse receipts issued by the Warehouse Company shall be outstanding, which said agreement of Lease is by reference made a part hereof with the same force and effect as if herein fully written out and shall hereinafter be referred to as "Coalberg Lease" and

[fol. 47] Whereas, by a collateral agreement between the parties hereto dated as of the date of the said "Coalberg Lease" to wit, 20th day of June, 1939, the parties further agreed as to their respective rights, duties and obligations in the control, management, and business of storing anthracite coal on the lands covered by the said Lease for a term or period of one (1) year and for such further term or period as may be necessary for the Warehouse Company to fill and completely discharge its obligations to owners of coal and holders of warehouse receipts covering coal held for storage on the leased premises; and by letter of October 9, 1939 addressed to the Customer by the Warehouse Company and by the Customer accepted and agreed to, the parties modified the "Fourth" paragraph of the said agreement changing the specific rate paid by the Customer to the Warehouse Company for coal stored on the leased premises from Two Cents ($.02) per ton to One Half Cent ($.01½) per ton effective as of October 1, 1939, which said collateral agreement as modified by the letter of October 9, 1939, is also by reference made a part hereof with the same force and effect as if herein fully written out and hereinafter shall be referred to as "Warehouse Agreement,"; and

Whereas, the parties hereto now desire and have agreed to extend the term of the said Coalberg Lease and Warehouse Agreement for a further period of one (1) year from and as of the 1st day of April, 1940, and thereafter from year to year, and as thus extended in term to modify the provisions of the "Fourth" paragraph of the Warehouse Agreement as hereinafter set forth:

[fol. 48] Now, therefore, this Agreement Witnesseth:

That for and in consideration of the facts heretofore set forth, as well as the sum of One ($1.00) Dollar lawful money of the United States of America from each of the parties to the other in hand paid, receipt whereof is hereby acknowl-

edged, the parties hereto have agreed and do hereby agree as follows:

First. The heretofore recited Coalberg Lease and Warehouse Agreement shall be and are hereby renewed and extended in term for a further period or term of one (1) year from the 1st day of April, 1940 to the 31st day of March, 1941, and thereafter from year to year until either party hereto shall notify the other of its desire to terminate and cancel the said Lease and Agreement by a written notice addressed to Pennsylvania Coal Company, Box 391, Scranton, Pennsylvania or to Independent Warehouses, Inc., 415 Greenwich Street, City of New York, New York, not less than thirty (30) days prior to the end of the present or any succeeding term, whereupon the said Coalberg Lease and Warehouse Agreement shall end and determine as of the end of the then current term except as to coal covered by outstanding negotiable or non-negotiable warehouse receipts issued by the Warehouse Company to Customer or to any person, firm, corporation, Company or Association which have not been surrendered or otherwise satisfactorily accounted for prior to the effective date of said notice.

Second. As of the effective date of this agreement, to wit, first day of April, 1940, the parties agree that the "Fourth" paragraph of the heretofore recited Warehouse Agreement as amended by letter of October 9, 1939, shall be and is further amended to read as follows:

[fol. 49] "Fourth: The Customer agrees to pay or cause to be paid to the Warehouse Company the sum of one half cent (½c) per ton for all coal, for which receipts are issued, which said Customer has placed or shall cause to be placed, or which shall remain in the possession or control of the Warehouse Company for one year from the date of the commencement of this agreement, or any part thereof. It is further understood that the yearly minimum amount payable by the Customer to the Warehouse Company, beginning April 1, 1940, is and shall be Five Hundred ($500.) Dollars."

Third. That except as herein specifically extended in term and modified the heretofore recited "Coalberg Lease" and "Warehouse Agreement" are ratified and affirmed.

In Witness Whereof, the parties hereto have caused this Agreement to be duly executed by their proper officers with

their corporate seals hereunto attached, attested by the signatures of their respective Secretaries or Assistant Secretaries, the day and year first above written.

Pennsylvania Coal Company, by (Sgd) H. J. Connolly, President.

Attest: (Sgd) F. V. Lynn, Asst. Secretary. (Seal)

[fol. 50] Independent Warehouses Inc., by (Sgd) E. H. Maxwell, President.

Attest: (Sgd) J. A. Muller, Treasurer Secretary. (Seal)

R. W. R.
E. D. A.

State of New York,
County of New York; ss:

On this 26th day of June, 1940 before me personally came E. H. Maxwell, to me known, who, being by me duly sworn, did depose and say that he resides in Katonah, New York, that he is the President of Independent Warehouses, Inc., the corporation described in and which executed the foregoing instrument; that he knows the seal of said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Edward L. Cunningham

Commonwealth of Pennsylvania,
County of Lackawanna, ss:

I hereby certify that on this 26th day of June, in the year of Our Lord One Thousand Nine Hundred and Forty, before me, the subscriber, a notary public, personally ap-
[fol. 51] peared H. J. Connolly, President of Pennsylvania Coal Company, the attorney named in the foregoing lease, and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said lease to be the act of said Pennsylvania Coal Company.

Witness my hand and my seal the day and year aforesaid.

James E. Hallock.

EXHIBIT P-8.

This Agreement, made in duplicate this 12th day of June 1940, by and between Pennsylvania Coal Company, a corporation of the State of Pennsylvania with offices at Scranton, Penna., hereinafter called the "Coal Company," party of the first part, and Walter Kidde, as Trustee of the property of New York, Susquehanna and Western Railroad Company, with offices in New York City, hereinafter called the "Railroad," party of the second part;

Witnesseth:

Whereas, the Coal Company owns a coal storage yard located at Coalberg (Rochelle Park, N. J.) which said yard prior to February 25, 1939, was operated by Pattison & Bowns, Inc., and under agreement dated September 16, 1926 between said Pattison & Bowns, Inc., and New York, Susquehanna and Western Railroad Company, as said agreement was thereafter supplemented and amended, Pattison & Bowns, Inc., furnished water for the locomotives of said Railroad Company and performed certain services for said Railroad Company at said yard, and

[fol. 52] Whereas, effective February 25, 1939, said Pattison & Bowns, Inc., discontinued the operation of said coal storage yard and the operation of said yard was then taken over by the Coal Company, party of the first part hereto and the latter continued to furnish water for the locomotives of the Railroad, party of the second part hereto, and to render services to the Railroad as theretofore and the Railroad paid for the same at the rates and prices set forth in said agreement of September 16, 1926, as supplemented and amended, and

Whereas, by agreement effective July 1, 1939 between the Coal Company and the Trustees of the property of Erie Railroad Company the Coal Company agreed to operate said coal storage yard for the benefit of the said Trustees, and effective on that date, the parties hereto arranged for the continuance of the furnishing of water for locomotives and the continuance of the other services theretofore furnished, payment therefor to be made by the Railroad Company to the Coal Company as hereinafter set forth;

Now, Therefore, the parties hereto hereby agree as follows, effective as of July 1, 1939:

1. The Coal Company shall, in the first instance, employ and carry on its payrolls a competent and responsible supervisor and chief clerk as well as other employees, equipment and facilities, to properly operate the pumps and their appurtenances for the pumping of water at the aforesaid coal storage yard at Coalberg, N. J., and agrees to furnish a supply of water from its tanks to be delivered at said yard to the locomotives of the Railroad, the amount of such supply of water to be the full amount required by the Railroad [fol. 53] for its locomotives, up to but not more than the present capacity of the pumping plant and storage tanks.

2. All pumps, pumping equipment and water tanks, together with their appurtenances, shall be maintained, repaired and renewed by the Coal Company at its sole cost and expense. The water crane and its necessary connections to the water tank of the Coal Company shall be maintained, repaired and renewed by the Railroad at the sole cost and expense of the latter.

3. The aforesaid supervisor and chief clerk of the Coal Company at said coal storage yard shall perform for the Railroad as heretofore, certain services consisting of billing and weighing of cars at said coal storage yard and the preparation and handling of necessary reports in connection therewith.

4. In consideration for the performance of said clerical services and weighing of cars by the said supervisor and chief clerk, the Railroad agrees to pay to the Coal Company periodically upon receipt of bills or vouchers therefor, two-thirds of the wages or salary of the said supervisor and two-thirds of the wages or salary of such chief clerk, plus two-thirds of the so-called payroll taxes (being taxes or contributions paid under State or Federal Laws and regulations for pensions or old-age retirement benefits and for unemployment insurance), which the Coal Company is obligated to pay upon the salaries or wages of said supervisor and chief clerk. It is agreed that the wages or salaries of the said supervisor and/or chief clerk shall not be increased without the consent of the Railroad. The cost of premiums or any bond or bonds required by the Railroad in connection with the said work performed for it in the [fol. 54] weighing of cars, shall be assumed and paid by the Railroad.

5. For the water furnished at said coal storage yard by the Coal Company for the locomotives of the Railroad, the Railroad agrees to pay to the Coal Company $75 per calendar month for the water furnished up to but not more than sixty thousand cubic feet per month.

If at any time the officers or authorized representatives of the Coal Company have reason to believe that the average monthly consumption of water by locomotives of the Railroad is more than sixty thousand cubic feet, they shall so advise the proper officers or representatives of the Railroad and if from the investigations of the officers or representatives of the Railroad or from evidence submitted by the Coal Company, the officers or representatives of the Railroad conclude that there may be an average consumption by locomotives of the Railroad in excess of sixty thousand cubic feet of water per month, then during a test period of six months immediately following, a daily record shall be kept in a manner to be agreed upon, of the water furnished for the Railroad's locomotives. If it is found, as a result of such test, that the average monthly consumption has been more than sixty thousand cubic feet, then the amount of the average excess per month shall be agreed upon, taking into consideration conditions during the test period and probable future conditions, and the officers or representatives of each of the parties hereto shall also agree on the additional amount per month to be paid by Railroad for such excess, which additional amount shall be at a rate of not more than $1.25 per thousand cubic feet.. [fol. 55] Payment at the increased rate per month as so determined, shall be made and continued until the parties find and agree that during any subsequent period of six months, a total average amount of water greater or less than the total average amount last previously agreed upon has been furnished. In case of agreement upon any such greater or less average amount of water, the amount per month to be paid by the Railroad shall be increased or decreased proportionately. Such finding and agreement shall be reached in accordance with the procedure outlined in the next preceding paragraph, provided, however, that demand for a decreased rate may be initiated by the officers or representatives of the Railroad.

In case the parties hereto shall be unable to agree as to any matter in the foregoing paragraphs of this Article provided to be agreed upon, within thirty days after advice

by either party to the other of the matter so to be determined and agreed upon between them, then either party hereto may terminate this Agreement by giving to the other party at least sixty days' previous notice in writing of such termination.

6. (a) For the purpose of determining liability, as between the parties hereto, for any loss of or damage to property or injury to or death of person (all hereinafter for convenience called "damage") occurring in connection with the furnishing of the water or the services as provided in this Agreement, it is agreed that each of the aforesaid supervisor and chief clerk shall be considered to be the sole employe of the party hereto for which he is currently performing service.

(b) Each party hereto shall be liable for all damage so [fol. 56] occurring due as a proximate cause to the negligence or fault of its officers, agents or employees or to the failure of its equipment or facilities.

(c) If any damage so occurring is caused by the negligence or fault of the employes of both parties hereto, or to the failure of the equipment or facilities of both parties hereto or to the fault or negligence of parties other than the parties hereto, or to the failure of the equipment or facilities of such other party, then and in any such case, each party hereto shall assume and bear the cost of all damage to its employes and property and to persons and property in its charge or possession, and all other damage so caused shall be borne and paid by the parties hereto in equal proportions.

(d) In every case of death, or injury occurring to an employee of either party, the compensation required by law to be paid on account thereof shall be borne and paid by one or both of the parties hereto in accordance with the foregoing provisions, and if and when such compensation is required to be paid in installments over a period of months or years, neither party shall be released from the payment of its share of any future installment for which it may be or become liable hereunder by the cancellation or termination of this Agreement.

7. This Agreement shall take effect as of the first day of July, 1939, and, as the same may be modified from time to

time by the mutual agreement of the parties, shall extend until terminated by mutual agreement or by either party giving to the other at least ninety days' notice in writing of such termination.

[fol. 57] 8. It is agreed between the parties hereto that this Agreement is intended to supercede and terminate as of September 1, 1939 the aforesaid agreement dated September 16, 1926 between New York, Susquehanna and Western Railroad Company and Pattison & Bowns, Inc., as said agreement was supplemented and amended and as of July 1, 1939, supercedes and terminates the arrangement between the parties hereto to continue the terms of the aforesaid agreement of September 16, 1926, as supplemented and amended.

In Witness Whereof, the parties hereto have executed this Agreement as of the date first hereinbefore written.

Pennsylvania Coal Company, by H. J. Connolly, President.

Attest: E. D. Adair, Secretary. Walter Kidde, as Trustee of the property of New York, Susquehanna and Western Railroad Company.

Witness: ——— ———.

[fol. 58] EXHIBIT P-9

This Agreement, made this 30th day of July 1931, between New York, Susquehanna and Western Railroad Company (hereinafter called the Railroad Company), and Pennsylvania Coal Company, a corporation incorporated under the laws of the State of Pennsylvania, with principal office at Scranton, Pa. (hereinafter called Pennsylvania), and The Pittston Company, a corporation incorporated under the laws of the State of Delaware, with principal office at 19-21 Dover Green, City of Dover, County of Kent, State of Delaware (hereinafter called Pittston), and Pattison & Bowns, Inc., a corporation incorporated under the laws of the State of New York, with principal office at 17 Battery Place, New York, N. Y. (hereinafter called Pattison).

Witnesseth

Whereas, Pattison is using track facilities for the economical and convenient conduct of its business, in the Town-

ship of Saddle River (Coalberg), County of Bergen, State of New Jersey, described as follows:

"A" beginning at a point of switch in sidetrack "O" and extending in a general westerly direction for a distance of 2005 feet to the outer end thereof, said sidetrack "A" having two hoppers thereunder,

"B" beginning at a point of switch in sidetrack "A" and extending in a general westerly direction for a distance of 1490 feet to outer end thereof, said sidetrack "B" having two hoppers thereunder,

Said sidetracks "A" and "B" being connected by two crossovers having a total length of 336 feet,

[fol. 59] "C" beginning at a point of switch in sidetrack "A" and extending in a northwesterly direction for a distance of 212 feet to outer end thereof,

"E" beginning at a point of switch in sidetrack "N" and extending in a westerly direction for a distance of 5000 feet, said sidetrack "E" having three track scales and one hopper thereunder,

"F" beginning at a point of switch in sidetrack "E" and extending in a westerly direction for a distance of 1380 feet to a point of switch in sidetrack "E",

"G" beginning at a point of switch in sidetrack "Y" and extending in an easterly direction for a distance of 1360 feet to outer end thereof,

"H" beginning at a point of switch in sidetrack "N" and extending in a westerly direction for a distance of 3080 feet to a point of switch in said sidetrack "I", said sidetrack "H" having four hoppers thereunder,

"I" beginning at a point of switch in sidetrack "H" and extending in a westerly direction for a distance of 2700 feet to a point of switch in said sidetrack "E", said sidetrack "I" having eight hoppers thereunder,

"J" beginning at a point of switch in sidetrack "I" and extending in an easterly direction for a distance of 270 feet to outer end thereof, said sidetrack "J" having one hopper thereunder,

"K" beginning at a point of switch in sidetrack "I" [fol. 60] and extending in an easterly direction for a distance of 250 feet to outer end thereof, said sidetrack "K" having one hopper thereunder,

"L" beginning at a point of switch in sidetrack "I" and extending in an easterly direction for a distance

of 250 feet to outer end thereof, said sidetrack "L" having one hopper thereunder,

"M" beginning at a point of switch in sidetrack "I" and extending in an easterly direction for a distance of 250 feet to outer end thereof, said sidetrack "M" having one hopper thereunder,

"N" beginning at a point of switch in westbound main track of the Railroad Company 75.5 feet easterly of M. P. 16 and extending in a general westerly direction for a distance of 2505 feet to a point of switch in track "R", said sidetrack "N" having one track scale thereunder,

"O" beginning at a point of switch in track "N" and extending in a westerly direction for a distance of 3990 feet,

"P" beginning at a point of switch in track "N," and extending in an easterly direction for a distance of 300 feet to outer end thereof,

"Q" beginning at a point of switch in track "H" and extending in a westerly direction for a distance of 1505 feet to a point of switch in track "U," said sidetrack "Q" having two hoppers thereunder,

"R" beginning at a point of switch in track "N" [fol. 61] and extending in a westerly direction for a distance of 1435 feet to a point of switch in track "Q," said sidetrack "R" having two hoppers thereunder,

"S" beginning at a point of switch in track "R" and extending in a westerly direction for a distance of 1405 feet to a point of switch in track "Q,"

"T" beginning at a point of switch in track "Q" and extending in a westerly direction for a distance of 320 feet to outer end thereof, said track "T" having one hopper thereunder,

"U" beginning at a point of switch in track "Y" and extending in an easterly direction for a distance of 510 feet to a point of switch in track "Q,"

"V" beginning at a point of switch in track "W" and extending in a westerly direction for a distance of 395 feet.

"W" beginning at a point of switch in track "U" and extending in a westerly direction for a distance of 775 feet, having one track scale thereunder;

"Y" beginning at a point of switch in track "W" and extending in a westerly direction for a distance of 495 feet,

said sidetracks being in the position shown by solid red, solid yellow, and red and yellow dashed lines, and said track scales and hoppers being shown in the position shown by solid green lines on plan entitled:

[fol. 62] N. Y. S. & W. R. R.

Main Line

Plan Showing Tracks Serving
Pittston Company

Coalberg, Township of Saddle River, N. J.
Office of Division Engineer Jersey City
Scale: 1"—100' Feb. 3, 1926.
Made by A.P.L. Ch'd By

Valuation Section 3-N. J.

Rev. Aug. 16, 1927 Rev. June 19-29 A-1493-S

, and,

Whereas, Pennsylvania owns the coal storage plant adjacent to the right of way of the Railroad Company which is served by said system of sidetracks, and said plant is leased by Pennsylvania to Pittston, subject however to a prior lease and agreement made between Pennsylvania and Pattison and assigned by Pennsylvania to Pittston.

Now, Therefore, in consideration of the covenants and agreements herein contained, it is mutually agreed that the sidetracks shall be maintained and used upon the following terms and conditions:

Definition. *First:* The word "sidetrack" as used in this agreement refers to all of the track facilities above described and intended to be covered by this agreement, and includes all appurtenances thereto and any trestle, hopper or other structure over which the track or tracks may be constructed.

Right-of-way. *Second:* Pattison shall provide, without cost to the Railroad Company, all necessary right of way outside of the right of way of the Railroad Company, re-
[fol. 63] quired for the proper construction and operation

of the sidetrack, said right of way to be satisfactory to the Superintendent of the Railroad Company.

Pattison assumes responsibility for obtaining, without cost to the Railroad Company (other than salaries of railroad officers, attorneys and employes), any ordinance, order, permit or consent whatsoever, required by municipal, state or other lawfully constituted authorities for the construction, operation, maintenance and use of the sidetrack, but the Railroad Company will, upon request of Pennsylvania, execute and file any application therefor which is required.

The Railroad Company shall have the right to enter upon the property for the purpose of constructing, maintaining and operating the sidetrack, and of removing, upon the termination of this agreement, any tracks, structures or materials belonging to the Railroad Company.

Maintenance. *Third:* The Railroad Company agrees except as hereinafter provided to repair and maintain at its own expense tracks "E," "F," and portion of track "N" located on its lands, and tracks "G," "O," "U," "V," "W" and "Y" located outside of the lands of and preponderantly used by the Railroad Company, said tracks being in solid red lines on said blueprint plan.

The Railroad Company further agrees except as hereinafter provided to repair and maintain track "H" and two portions of track "I" on its lands, and tracks "Q," "R," "S" and portions of tracks "I" and "N" located outside of the lands of the Railroad Company in consideration of the use by the Railroad Company for purposes other than serving Pattison, and Pattison agrees to reimburse the Railroad for 50% of the cost of such repair and main- [fol. 64] tenance, said tracks being shown in red and yellow dashed lines on said blueprint plan.

However, should at any future time for any reason the Railroad Company no longer avail itself of the use of any portion of the sidetrack located outside the lands of the Railroad Company and included in the first and second paragraphs of this Article, it is agreed that it will no longer continue to repair and maintain such portion of the sidetrack, in which case Pattison shall, at its own expense, maintain, repair and renew to the satisfaction of the Superintendent of the Railroad Company such portion of sidetrack located outside the lands of the Railroad Company.

Pattison shall, at its own expense, maintain, repair and renew to the satisfaction of the Superintendent of the Railroad Company, tracks "A" and "B" (including two connecting crossovers between said tracks) "C," "J," "K," "L," "M," "P" and "T," and portion of track "N" shown in solid yellow lines on said blueprint plan. Maintenance shall include removal of snow and ice.

However, upon receipt of request from Pattison, the Railroad Company will, when practicable, furnish material or labor required by this paragraph to be furnished by Pattison, and Pattison shall advance to the Railroad Company the estimated cost thereof. If the cost as finally determined is less than the sum so advanced, the Railroad Company shall repay to Pattison the difference, and if such cost exceeds the sum so advanced, Pattison shall pay to the Railroad Company the amount of such excess upon receipt of proper bill therefor. Both the estimated and the final cost above referred to shall include for accounting, supervision and use of tools, fifteen per cent. (15%) of all items of labor and materials.

[fol. 65] Pattison further agrees to repair and maintain at its own expense all hoppers and track scales, except as hereinafter provided, under said sidetracks and tell-tales, said hoppers and said track scales being in the position shown by green lines and said tell-tales in the position shown by white cross lines on said blueprint plan, except that the Railroad Company agrees to repair and maintain track scale No. 4 under track "W" so long as it shall have use for same and in event such use shall be discontinued Pattison will assume the entire cost of repair and maintenance of said track scale No. 4.

If Pattison fails to perform its obligations in connection with maintenance as above set forth, then the Railroad Company, after notice to Pattison may refuse to operate over the sidetrack or obstruct the same or remove any portion thereof belonging to the Railroad Company.

Ownership. *Fourth:* The portion of said sidetrack within the boundaries of the lands of the Railroad Company is its property. The portion of said sidetrack within the boundaries of the lands of Pennsylvania is the property of Pennsylvania. The hoppers, tell-tales and track scales are the property of Pennsylvania.

Other Uses. *Fifth:* The Railroad Company may use the sidetrack for general railroad purposes provided such use will not interfere with the reasonable use of the sidetrack for the traffic of Pattison.

The Railroad Company also expressly reserves the right to connect the part of the sidetrack located on its premises with other tracks for its own use or that of third parties, and in the event of any such connection and use there shall [fol. 66] be a reduction in Pattison's expense of maintenance, and an adjustment of Pennsylvania's original outlay for such jointly used portion of the sidetrack; said reduction and adjustment to be determined by the extent of such use.

Pennsylvania, Pittston and Pattison agree not to connect the sidetrack with any other track, or permit the use thereof by anyone not a party hereto, without the written consent of the Railroad Company.

Changes. *Sixth:* If at any time by reason of the order of any governmental authority or the Railroad Company's operating requirements, or otherwise, the Railroad Company shall relocate, reconstruct or change the grade of its tracks or other structures, or discontinue operation thereof, so as to require the relocation, reconstruction, change or removal, temporarily or permanently, of the sidetrack, it is agreed that the Railroad Company shall not be required to pay the cost of such relocation, reconstruction, change or removal of the portion of the sidetrack beyond the clearance point, and, as between the parties hereto Pennsylvania, Pittston, and Pattison each hereby waives all claims for any expense, loss or damage to its property or business resulting from the relocation, reconstruction, change or removal of the sidetrack.

Clearance. *Seventh:* Pennsylvania, Pittston and Pattison each agrees that it will not hereafter permit any of its objects or structures to be constructed over the sidetrack at less than twenty-one feet above the top of rail, or alongside of the sidetrack at less than six feet from the nearest rail, with the necessary additional clearance on curves.

[fol. 67]. *Eighth:* Pattison agrees to pay the entire cost of maintenance of dry walls adjacent to tracks "J," "K," "L," "M" and "T" as indicated by white shaded lines on blueprint hereinbefore referred to, and further agrees that

the Railroad company will not be responsible for the maintenance of said dry-walls and further that it will save harmless the Railroad Company from any and all loss, damage or injury to persons or property including the death of any person or persons occasioned by, arising out of or in any way connected with the existence or maintenance of said dry-walls.

Cancellation. *Ninth*: It is hereby mutually agreed by and between the Railroad Company and Pennsylvania that a certain agreement between them dated September 22nd, 1915 covering construction, ownership, operation and maintenance of 4665 feet of sidetrack at Coalberg, N. J., be and it hereby is terminated and cancelled as of the date hereof.

Liability. *Tenth*: It is understood that the movement of railroad locomotives involves some risk of fire, and Pittston and Pattison each respectively assumes all responsibility for and agrees to indemnify the Railroad Company against loss or damage to its property or to property upon its premises or premises leased or occupied by it, regardless of negligence of the Railroad Company, its officers or employes, arising from fire caused by locomotives operated by the Railroad Company on the sidetrack or in its vicinity for the purpose of serving Pattison, except to the premises of the Railroad Company and to rolling stock belonging to the Railroad Company or to others and to shipments in the course of transportation.

[fol. 68] Pittston and Pattison each severally and respectively agrees to indemnify and hold harmless the Railroad Company for loss, damage or injury from any act or omission of said Pennsylvania, Pittston and Pattison, their respective employes, or agents, to the person or property of said Pennsylvania, Pittston and Pattison, and their employes, and to the person or property of any other person or corporation, while on or about the sidetrack; and if any claim or liability, other than from fire, shall arise from the joint or concurring negligence of the firms or corporations executing this agreement, it shall be borne by them equally.

Inflammable Materials. *Eleventh*: It is mutually understood and agreed that no refinery or casinghead gasoline, benzine, nap-tha or any other inflammable liquid having a flash point below 30 degrees Fahrenheit shall be handled on

the sidetrack unless Pennsylvania, Pittston and Pattison shall sign the Railroad Company's form of Supplemental Agreement covering the handling of such inflammable material.

Termination. *Twelfth*: This Agreement may be cancelled and terminated by any party giving to the other at least sixty (60) days previous notice in writing; but, until so cancelled and terminated, shall continue in full force and effect. Pennsylvania, Pittston and Pattison agree not to assign this Agreement nor any rights thereunder without the written consent of the Railroad Company. The rights, duties and obligations of the respective parties hereto under this Agreement shall carry to and be binding upon their lessees, successors and assigns, respectively. The terms of this agrement, except insofar as they relate to the description and cost of the particular track herein provided for, [fol. 69] shall apply to any additions to or extensions or relocations of the sidetrack.

In Witness Whereof, the parties hereto have caused this Agreement to be executed in quadruplicate the day and year first hereinbefore written.

New York, Susquehanna and Western Railroad Company, By R. E. Woodruff, Vice President.

Witness as to the Railroad Company: C. E. Post. Pennsylvania Coal Company, By C. E. Denney, President.

Witness as to Pennsylvania: Geo. A. W. Achenbach, Assistant Secretary. The Pittston Company, By Michael Gallagher, President.

Witness as to Pittston: C. F. Hurd, Jr. Pattison & Bowns, Inc., By Lardner Pattison, President.

Witness as to Pattison: F. J. Schaeffer.

[fols. 76-77]

EXHIBIT P-10.

Pennsylvania Coal Company

Statement of Operation of Coalberg Coal Storage Plant from January 1, 1941 to December 31, 1943.

(1) Year	(2) 1941	(3) 1942	(4) 1943
Expenses:			
Payrolls	$16,890.62	$19,238.88	$21,669.37
Supervision (15%) P. C. Co.	2,533.60	2,885.85	3,250.41
Social Security Taxes:			
Old Age (1%)	168.92	190.59	211.08
Unemployment (3%)	506.74	571.77	633.25
Insurance	189.37	256.20	128.98
Taxes (R. E. Saddle River Twp.)	7,784.47	7,770.96	7,770.96
Materials, Supplies, Power, etc.	5,813.97	5,984.50	5,764.47
Public Liability & W/C Ins.	522.39	960.20	1,185.92
Independent Warehouses, Inc.:			
Thompson Salary (& Tax)	1,830.40	1,996.80	2,201.22
Storage Charges	708.69	135.98	437.69
Group Insurance Premium	20.40	27.97	22.08
Car Rentals (NYS&W)	10.00	52.75	
Legal Expenses			5,118.15
Total	$36,970.27	$40,072.45	$48,393.58
Credits:			
N. Y. S. & W. (Contr. 6/12/40:			
Salary Proportions	$2,238.00	$2,238.00	$2,238.00
Pumping Water	900.00	900.00	900.00
Sale of Track Screenings and Scrap	157.33	214.25	97.33
Total	$3,295.33	$3,352.25	$3,235.33
Net Expenses:	$33,674.94	$36,720.20	$45,158.25
Gross Tons Handled:			
In	138,109.06	33,480.07	13,625.15
Out	47,854.16	90,984.03	84,654.01
*Collections	$26,035.02	$18,342.82	$14,422.66
Operating Deficit:	$7,639.92	$18,377.38	$30,735.59

* Tariff Rate per ton, Jan. 1, 1941—Mch. 17, 1942, inclusive, 14c. in and 14c. out. Mch. 18, 1942—May 15, 1943, 15c. in and 15c. out. May 16, 1943—Dec. 31, 1943, 14c. in and 14c. out.
License fee on complained area amounts to:
$1.52 per ton on coal put in storage in 1943.
21¢ per ton on all 1943 in and out combined.

L. W. RADCLIFF
Vice President
and Comptroller.

2/16/44
M.

[fol. 78] EXHIBIT P-13

Township of Saddle River

An ordinance to amend an ordinance, entitled "An ordinance to license and regulate the licensing of various kinds of businesses, trades and occupations in the Township of Saddle River, in the County of Bergen, and to prohibit all persons and places unlicensed from acting, using or being used in said business, trades or occupations, and for such uses and purposes fixing fees and providing penalties for the violation thereof," adopted July 10th, 1931.

[fol. 79] Be it ordained by the Township Committee, of the Township of Saddle River, in the County of Bergen:

1. That section 6 of an ordinance entitled: "An ordinance to license and regulate the licensing of various kinds of businesses, trades and occupations in the Township of Saddle River, in the County of Bergen, and to prohibit all persons and places unlicensed from acting, using or being used in said business, trades or occupations and for such uses and purposes fixing fees and providing penalties for the violation thereof," adopted July 10, 1931, be and the same is hereby amended, to read as follows:

Section 6—The following enumerated businesses, trades, employments, vocations, occupations, or purposes, are hereby required to be licensed and the license fees therefore are hereby fixed as follows:

Itinerants, Vendors and Peddlers	9.00
Hawkers	9.00
Junk or Rag Dealers (per vehicle)	5.00
Push Cart, or Park Peddlers	9.00
Auctioneer	75.00
Traveling Shows	75.00
Circuses, per day	100.00
Outdoor Carnival, annual	500.00
Outdoor Carnival, one week or less	100.00
Milk Dealers, per wagon	9.00
Grocers, per wagon	9.00
Butchers, per vehicle	9.00
Bakers, per vehicle	9.00

Dealers in soft Beverages	9.00
Live Poultry Dealers	25.00
Bowling Alleys, per alley	1.00
Dance Halls	10.00

[fol. 80]

Motion Picture Houses	50.00
Pool and Billiard Parlors, per table	5.00
Ice Dealers, per wagon	9.00
Gas and Oil Stations, per Pump	5.00
Sale of Fire Works, per stand or store	25.00
Collectors of Butchers Refuse	10.00
Barber Shops, per chair	1.00
Min-ature Golf Courses or Driving Range, or similar amusement devices	25.00
Boarding Houses	15.00
Lodging Houses	15.00
Junk Shop	25.00
Junk Yard	25.00
Employment Agency	10.00
Public Garage	10.00
Exhibitions	75.00
Concerts, one week or less	25.00
Theatrical Performances, one week or less	25.00
Any other place of amusement	50.00
Rendering Plants	500.00

2. This ordinance shall take effect upon passage and publication in the manner required by law.

Jos. Gardiner, Township Clerk.

March 13-20 Fees $22.44.
3-9-34
3-23-34

[fol. 81] EXHIBIT P-14

Township of Saddle River

An ordinance to supplement an ordinance entitled "An ordinance to license and regulate the licensing of various kinds of businesses, trades and occupations in the Township of Saddle River, in the County of Bergen, and to prohibit all persons and places unlicensed from acting, using or being used in said business, trades or occupations, and for such uses and purposes, fixing fees and providing penalties for the violation thereof," adopted July 10th, 1931, as amended March 23rd, 1934.

Be it Ordained by the Township Committee of Saddle River, in the County of Bergen:

1. That the license fees for rendering plants, as fixed in Section 6 of the ordinance entitled "An ordinance to license and regulate the licensing of various kinds of businesses, trades and occupations in the Township of Saddle River, in the County of Bergen, and to prohibit all persons and places unlicensed from acting, using or being used in said business, trades or occupations, and for such uses and purposes fixing fees and providing penalties for the violation thereof," adopted July 10th, 1931, as amended March 23rd, 1934, be and the same is hereby fixed at One Hundred and Fifty Dollars ($150.00).

2. Except as herein modified, said Section 6 of said ordinance, as heretofore amended, and the license fees for the businesses, trades, employments, vocations, occupations or [fol. 82] purposes therein enumerated, shall remain unchanged and in full force and effect.

3. This ordinance shall be retroactive to January 1st, 1939, and shall take effect when passed and published in the manner required by law.

12-13-'40
12-27-'40

[fols. 83-123] EXHIBIT D-1

Anthracite

Our Prices for Pittston Coal, as authorized by the Office of Price Administration effective November 24, 1943 and until further notice, per net ton of 2,000 lbs. F. O. B. Mines with discounts allowed for cash in fifteen days from date of invoice, are shown on the opposite page.

All orders are accepted and shipments made subject to the conditions printed on the back hereof.

November 24, 1943.

Pattison & Bowns, Inc. Pittston Coal New York

Size	November 24, 1943 Prices per Net Ton	Cash Discount per Net Ton
Grate	$8.00	15¢
Egg	8.00	15¢
Stove	8.00	15¢
Chestnut	8.00	15¢
Pea	6.45	10¢
Buckwheat	4.80	10¢
Rice	3.85	5¢
Barley	2.85	5¢

Terms—Thirty Days, Net Cash

Quality Service

EXHIBIT P-12

I. C. C. No. D-1438
Cancels I. C. C. No D-1390
P. U. C.-N. J. No. 236
Cancels P. U. C.-N. J. No. 206

Erie Railroad Company ..... Tariff No. G. O. 2213-G

Wilkes-Barre & Eastern R. R. Co. ..... Tariff No. W. E. 1610-F
Cancels Nos. G. O. 2213-F, E. W. 5447 and W. E. 1610-E)

ERIE RAILROAD COMPANY

(Robert E. Woodruff and John A. Hadden, Trustees)

IN CONNECTION WITH

RAILROADS AS SHOWN ON PAGE 2

JOINT AND PROPORTIONAL TARIFF

Naming Rates in Cents Per Ton of 2,240 Pounds on

ANTHRACITE COAL

ANTHRACITE BRIQUETTES AND BOULETS, CARLOADS

Minimum weight marked capacity of car, except that when cars are loaded to cubical or visible capacity, actual weight, will apply. When a car of given capacity is ordered and a car of greater capacity is furnished, the minimum weight will be that provided for the car ordered, but not less than 80,000 pounds for open top cars (see note) and 45,000 pounds for box and stock cars.

NOTE—If it is found that the contents of a car weigh less than the minimum, the car must be examined by the Weighmaster or other designated representative of the carriers, and if the car has been loaded full, the shipment will be billed at the actual weight. Proper notation must be shown on the waybill why the longer minimum weight is used.

For capacity of cars, see Agent M. A. Zenobia's Official Railway Equipment Register, I.C.C.-R.E.R. No. 256 P.U.C.-N.J. -R.E.R. No. 256, or successive issues thereof.

ALSO

RULES GOVERNING STORAGE OF ANTHRACITE COAL, ANTHRACITE BRIQUETTES AND BOULETS AND HANDLING CHARGES IN CENTS PER TON OF 2,240 POUNDS IN CONNECTION T' EREWITH

AT

ROCHELLE PARK (COALBERG), N. J.

AS DEFINED IN REFERENCE ① ON PAGE 3

FROM STATIONS ON THE	TO
ERIE RAILROAD LACKAWANNA & WYOMING VALLEY R. R. NEW YORK, ONTARIO & WESTERN RY. WILKES-BARRE & EASTERN RAILROAD (As Shown on Page 2)	ROCHELLE PARK, (COALBERG) N. J. (As Shown on Page 5)

ISSUED JULY 11, 1940

EFFECTIVE AUGUST 12, 1940
(Except as otherwise provided herein)

Issued by W. P. VAN IDERSTINE, Chief of Tariff Bureau, Midland Building, Cleveland, Ohio

J. A. FERGUSON,
Coal Freight Agent,
Cleveland, O.

WM. H. STADELMAN,
Coal Traffic Manager,
Cleveland O.

File 6
File 1790

RECEIVED		
Month	Day	Year

(MADE IN U. S. A.)

J. E.

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PARTICIPATING CARRIERS

CARRIERS	Concurrence Forms and Numbers I.C.C. FX	I.C.C. No.	For Rates See Pages
Lackawanna and Wyoming Valley Railroad Company	5	22	...
New York, Ontario and Western Railway Company (Frederic E.Lyford, Trustee)	4	84	...
New York, Susquehanna and Western Railroad Company (Walter Kidde, Trustee)	4	A-255	5
Wilkes-Barre and Eastern Railroad Company (Joseph P.Jennings, Trustee)	4	C-257	...

ALPHABETICAL LIST AND INDEX OF STATIONS FROM WHICH RATES APPLY

STATIONS	Railroad Located On	Index No.	STATIONS	Railroad Located on	Index No.	STATIONS	Railroad Located on	Index No.
Archbald....Pa.	NYO&W	34	Jenkins Jct....Pa.	W&E	23	Plains....Pa.	W&E	25
Avoca....Pa.	Erie	7	Jermyn....Pa.	NYO&W	33	Plains Jct....Pa.	Erie	9
Blakely....Pa.	W&E	14	Jessup....Pa.	Erie	4	Providence....Pa.	NYO&W	41
Carbondale....Pa.	Erie	12	Mayfield(D.&H. R.R. Tracks)....Pa.	Erie	5	Riverside Jct.Pa.	W&E	17
Carbondale....Pa.	NYO&W	31	Mayfield Yard....Pa.	NYO&W	32	Rocky Glen....Pa.	L&WV	28
Dickson....Pa.	NYO&W	38	Midvale....Pa.	L&WV	29	Scranton....Pa.	Erie	3
Dickson....Pa.	W&E	16	Minooka....Pa.	W&E	20	Scranton....Pa.	NYO&W	43
Dunmore....Pa.	Erie	2	Moosic....Pa.	W&E	21	Sibley Jct....Pa.	NYO&W	39
Dunmore....Pa.	L&WV	26	Olyphant....Pa.	NYO&W	37	Suscon....Pa.	W&E	18
Forest City....Pa.	Erie	10	Olyphant....Pa.	W&E	15	Throop....Pa.	NYO&W	40
Forest City....Pa.	NYO&W	30	Park Place....Pa.	NYO&W	42	Virginia....Pa.	L&WV	27
Hanley....Pa.	Erie	1	Peckville....Pa.	NYO&W	36	Winton....Pa.	NYO&W	35
Hillside Jct....Pa.	Erie	6	Peckville....Pa.	W&E	13	Yatesville....Pa.	W&E	24
Hillside Jct....Pa.	W&E	19	Pittston....Pa.	Erie	8			
Monesdale....Pa.	Erie	1-A						

GEOGRAPHICAL LIST OF STATIONS FROM WHICH RATES APPLY

Index No.	STATIONS	Index No.	STATIONS	Index No.	STATIONS
	ERIE R.R. Wyoming Division		W.& E.R.R. Via Jessup, Pa. Winton Branch		N.Y.O.& W. Ry. Via Riverside Jct., Pa.
1	Hanley....Pa.	16	Dickson....Pa.	30	Forest City....Pa.
1-A	Monesdale....Pa.	17	Riverside Jct....Pa.	31	Carbondale....Pa.
2	Dunmore....Pa.		W.& E.R.R. Via Hillside Jct., Pa. Main Line	32	Mayfield Yard....Pa.
3	Scranton....Pa.	18	Suscon....Pa.	33	Jermyn....Pa.
4	Jessup....Pa.	19	Hillside Jct....Pa.	34	Archbald....Pa.
5	Mayfield (D.&H.R.R. Tracks)....Pa.	20	Minooka....Pa.	35	Winton....Pa.
6	Hillside Jct....Pa.	21	Moosic....Pa.	36	Peckville....Pa.
7	Avoca....Pa.	23	Jenkins Jct....Pa.	37	Olyphant....Pa.
8	Pittston....Pa.	24	Yatesville....Pa.	38	Dickson....Pa.
9	Plains Jct....Pa.	25	Plains....Pa.	39	Sibley Jct....Pa.
	Jefferson Division		L.& W. V.R.R. Via Dunmore, Pa., or Pittston, Pa.	40	Throop....Pa.
10	Forest City....Pa.	26	Dunmore....Pa.	41	Providence....Pa.
12	Carbondale....Pa.	27	Virginia....Pa.	42	Park Place....Pa.
	W.& E.R.R. Via Jessup, Pa. Winton Branch	28	Rocky Glen....Pa.	43	Scranton....Pa.
13	Peckville....Pa.	29	Midvale....Pa.		
14	Blakely....Pa.				
15	Olyphant....Pa.				

EXPLANATION OF ABBREVIATIONS

&.....	And.
¢.....	Cent or Cents.
D.& H.....	Delaware & Hudson Railroad.
I.C.C.....	Interstate Commerce Commission.
Jct.....	Junction.
L.& W.V....	Lackawanna and Wyoming Valley Railroad.
N.J.....	New Jersey.
No.....	Number.
N.Y.O.& W..	New York, Ontario and Western Railway.
N.Y.S.& W....	New York, Susquehanna & Western Railroad.
Pa.....	Pennsylvania.
P.U.C.-N.J...	Board of Public Utility Commission, State of New Jersey.
R.E.R.....	Railway Equipment Register.
R.R.....	Railroad.
Ry.....	Railway.
W.& E.....	Wilkes-Barre and Eastern Railroad.

EXPLANATION OF REFERENCE MARKS

♦ Advance.
(R) Issued to meet Motor Competition.
(I) Rules Governing Storage of Anthracite Coal, Anthracite Briquettes and Boulets and Handling Charges.

Shipments of Anthracite Coal, Anthracite Briquettes and Boulets, in carloads, from points of origin on the ERIE RAILROAD, or connecting carriers as named herein, will be accorded the privilege of storage in stock piles of the ERIE RAILROAD at Rochelle Park (Coalberg) N.J., up to the capacity of the Stock Piles, under the following conditions, and at charges as provided in the following rules:

(a) APPLICATION FOR STORAGE SPACE.
Shippers must first ascertain from the Coal Traffic Department, Erie Railroad, 50 Church Street, New York, N.Y. whether storage space is available before making shipments to the Stock Pile. The Erie Railroad reserves the right as conditions require to designate the kind, grade or size of Anthracite Coal which may be stored in each of its storage piles and places.

(b) METHOD OF CONSIGNMENT.
Shipments intended for storage should be consigned to the transit party and be billed to the Stock Pile as destination and such information shown on shipping order.

(c) HANDLING CHARGES
The Erie Railroad charges for handling at Rochelle Park (Coalberg) N.J., which are to be assessed and collected at the time service is performed, will be as follows:
(1) Unloading from cars into Stock Pile.....14¢ per ton of 2,240 pounds.
(2) Reloading into cars for reshipment.....14¢ per ton of 2,240 pounds.

(d) TIME LIMIT.
The period of time allowed for the storage privilege and protection of the through rate from point of origin to ultimate destination shall be two (2) years from date of delivery at storage point, as shown on the inbound freight (expense) bill. The Erie Railroad reserves the right to require owners to remove their coal at the expiration of the two years period. Any coal which is not reshipped within two (2) years will lose the privilege of being reshipped at the through rates from point of origin to destinations beyond the storage yard and freight charges will be collected on the basis of the local rates in effect on the date same size of coal was originally shipped from the mines to Rochelle Park, N.J. and the local rates applicable from Rochelle Park, N.J. in effect at the time shipment is forwarded from storage to the ultimate destination, plus handling charges as shown in Rule C.

(e) RATES APPLICABLE TO AND FROM STORAGE.
Lawfully published rate from point of shipment to the Stock Pile, will be assessed. The balance of the through rate to ultimate destination will be assessed when reloaded and reshipped to final destination.

Shipments from storage will be waybilled at the difference in rate which was in effect in tariffs lawfully published and filed with the Interstate Commerce Commission on date of shipment from the mines to the ultimate destination and the rate collected on the coal when it moved into storage at Rochelle Park (Coalberg) N.J.

♦If coal is reshipped from Rochelle Park (Coalberg) N.J., to a destination taking lower rate from point of origin than rate collected to Rochelle Park (Coalberg) N.J., the rate in effect on date of shipment from point of origin to Rochelle Park (Coalberg) N.J., will apply.

The rates provided in this tariff to the storage yard do not apply for local delivery. The rate in effect to Rochelle Park, N.J. for local delivery, in accordance with Erie R.R.I.C.C.No.D-1301, Tariff No.G.O.2223-H, or successive issues thereof, will be charged and collected on any coal that may be taken from storage for local delivery.

If no joint through rate is published to final destination, the rate to be charged will be the published through rate from mines to a point to which a through rate is published, plus the local rate or rates beyond making the lowest combination.

(f) IDENTITY.
The identity of the Coal will not be preserved.

(g) RECONSIGNMENT.
No charge will be made for reconsignment, or change in the name of consignor, at Stock Pile.

(h) RECORDS.
The Erie Railroad will keep a record showing waybill reference, car initials, numbers and tonnage of all Anthracite unloaded into or reloaded from storage as follows:
Received:
Origin and weight of each size of coal separately.
Forwarded:
(1) By rail, showing size of coal of each carload (when size of coal is different from size placed in storage, the size of the original coal will also be shown.)
(2) By truck.
(3) By other means.

(i) INSPECTION.
The Erie Railroad reserves the right to make visual inspection, and laboratory test when it is deemed necessary, of all coal to be dumped, to insure a uniformity of quality; and to refuse to accept any coal for storage which is inferior in quality to that already in the storage pile.

(j) LOSS AND DAMAGE.
The Erie Railroad will not be responsible for loss, deterioration, or degradation due to handling, or due to damage by the elements at the storage plant.

(k) WEIGHTS.
The actual weights will be credited or debited regardless of the minimum carload weight on which charges are assessed.

(l) CANCELLATION AND ADJUSTMENT OF TONNAGE.
Tonnage inbound to Storage will be credited and tonnage outbound from storage will be debited based on the size of coal as shipped.

(m) WAYBILLS.
Waybills for all shipments from storage will bear notation "Accorded Storage Privilege at Coalberg".

(n) RESTRICTIONS.
Shipments will not be accepted under these rules for a station or point of delivery against which an embargo is in force except, however, those made under authorized permits are not subject to this condition.

(R) Expires with December 20, 1940, unless sooner cancelled, changed or extended.
♦ Effective December 21, 1940, unless sooner cancelled, changed or postponed.
(I) Lump, Grate, Range, Egg, Stove and Chestnut sizes.

EXHIBIT P-12

RULES GOVERNING TARIFF

Rule No.1. **APPLICATION OF RATES**

The rates named in this tariff will apply only to Rochelle Park (Coalberg), N.J., when for storage and re-shipment. When coal is re-shipped the rate applicable will be the balance of the through rate from original point of shipment to ultimate point of destination, as published in Erie R.R. tariffs on file with the Interstate Commerce Commission in effect on date of initial movement from point of origin.

If coal is reshipped from Rochelle Park (Coalberg), N.J. to a destination taking lower rate from point of origin than rate collected to Rochelle Park (Coalberg), N.J., the rate in effect on date of shipment from point of origin to Rochelle Park (Coalberg), N.J. will apply.

Rule No.2. **COMMODITY RATES APPLICABLE FROM INTERMEDIATE POINTS**

Subject to the provisions of notes 1,2,3 and 4 below, from any point of origin from which a commodity rate on a given article to a given destination and via a given route is not named in this tariff, which point is intermediate to a point from which a commodity rate on said article is published in this tariff via a route through the intermediate point over which such commodity rate applies to the same destination, apply from such intermediate point to such destination and via such route the commodity rate in this tariff on said article from the next point beyond from which a commodity rate is published herein on that article to the same destination via the same route.

Note 1.--When by reason of branch or diverging lines there are two or more "next beyond" points, apply the rate from the next point beyond (in this tariff) which on that article to the same destination via the same route results in the lowest charge.

Note 2.--If the intermediate point is located between two points from which commodity rates on the same article via the same route are published in this tariff, apply via that route from the intermediate point the rate from the next point in either direction which results in the higher charge. In applying this note, if there are two or more next beyond points due to branch or diverging lines, eliminate all such next beyond points except the point from which the lowest charge is applicable.

Note 3.--If the class rate on the same article via the same route from the intermediate point produces a lower charge than would result from applying the commodity rate under this rule, such commodity rate will not apply.

Note 4.--If there is in any other tariff a commodity rate on the same article from the intermediate origin point applicable over the same route to the same destination, the provisions of this rule are not applicable from such intermediate origin point.

Rule No.3. **TERMINAL OR TRANSIT PRIVILEGES OR SERVICES**

In the absence of specific provisions in this tariff to the contrary, shipments transported under this tariff will be entitled to such allowances and privileges and subject to such charges, rules and regulations of originating carriers parties to this tariff, for property while in their possession, and of any of the intermediate or delivering carriers parties to this tariff, for property while in their possession, as are provided in tariffs lawfully in effect and on file with the Interstate Commerce Commission as to Interstate Traffic, with the Canadian Transport Commission and with State Commissions covering traffic subject to their jurisdiction, for

Terminal or Transit Privileges or Services, including also

Car Rental	Elevation	Loading	Storage
Car Service	Floatage	Private Car Mileage	Switching
Cartage	Heater Service	Reconsignment	Transfer
Demurrage	Icing	Refrigeration	Transit Privileges
Diversion	Lighterage	Stop-off	Unloading
			Weighing

Rule No.4. **MIXED CARLOAD SHIPMENTS**

On mixed carload shipments of various sizes the highest rate published on any size contained in the car will be used on the entire consignment.

Rule No.5. **DEMURRAGE**

Shipments under this tariff will be governed by Car Demurrage Rules contained in Agent B.T.Jones' Demurrage Tariff No.4-T, I.C.C.No.3853 (Erie R.R.No.7-B00-R), or Successive issues. While shipments are on connecting lines, rules and regulations of those lines will govern.

Rule No.6. **RECONSIGNMENT**

For rules governing reconsignment while on Erie R.R., N.Y.S.& W.R.R. and W.& E.R.R., see Erie R.R. (Lines East) I.C.C.No.D-1481, Tariff No.G.O.2226-H, S.&W.4044-H, W.& E.1669-H, or successive issues thereof. After delivery to connecting lines, shipments are subject to the rules and regulations of such lines when lawfully filed with the Interstate Commerce Commission. (See Exception).

Exception.--See Reference Mark Ⓓ, Rule g, Page 8.

Rule No.7. **CARRIERS ROUTING**

The rates named in this tariff will apply only via the routes and junction points authorized herein except that when in the case of pronounced traffic congestion (not an embargo), washout, wreck, or other similar emergency or through carriers' error, carriers forward shipments via other junction points of the same carriers or via the lines of other carriers parties to the tariff the rate to apply will be that specified in this tariff but not higher than the rate applicable via the route of movement.

Departure from the terms of the Amended Fourth Section of the Interstate Commerce Act is permitted by authority of Interstate Commerce Commission Fourth Section Order No.10600, of July 25, 1930.

EXHIBIT P-12

6.0.2213-6

STATION TO WHICH RATES APPLY AND RATES APPLICABLE THERETO

TO	Rates in Cents Per Ton of 2,240 Pounds		
	SIZES		
	④ Prepared	Pea	Smaller
Rochelle Park (Coalberg), ... N.J.	⑨ 230 ⑩ 250	⑨ 218 ⑩ 230	230

ROUTING INSTRUCTIONS

Rates shown herein will apply only via route shown below.

ROUTE

1.—Erie R.R. to Passaic Jct.,N.J.,N.Y.S.& W.R.R. to destination.

[fol. 126] EXHIBIT P-16

To the Township Committee of the Township of Saddle River, Bergen County, New Jersey.

The Pennsylvania Coal Company, a corporation of the Commonwealth of Pennsylvania, owner of certain lands and premises in the Township of Saddle River, Bergen County, New Jersey on which a coal storage plant is situated, and Independent Warehouses, Inc., a corporation of the State of Ney York, engaged in the business of storing goods for hire, the lessee of said lands and premises, which occupies and uses them for the storage of coal for hire, severally, object to and protest against the proposed ordinance entitled "An ordinance to regulate and license the business of the storage of personal property in warehouses engaged in the business of storing goods for hire and the place or premises in or at which said business is conducted and carried on, to prescribe fees for such licenses, and to provide penalties for the violation of this ordinance," said to have been introduced and passed on first reading at a meeting of the Township Committee held on the 13th day of January, 1943, on the grounds that said ordinance is wrongful, unlawful, unconstitutional and illegal.

Dated January 23rd 1943.

Pennsylvania Coal Company, Independent Warehouses, Inc. By Collins & Corbin, Attorneys.

[fol. 127]

Exhibit P-17.

Statement of coal in storage at Coalberg Storage Plant by sizes, in Net Tons as of the first of each month from Jan. 1, 1942 to Aug. 1, 1944.

		NET TONS							
		Stove	Chestnut	Pea	Buckwheat	Rice	Barley	Screenings	Total Net Tons
January	1, 1942	2,496.65	9,032.10	35,478.95	89,506.00	11,083.90	12,889.65		160,487.25
February	1, "	2,496.65	8,297.90	34,821.75	82,081.65	7,832.55	12,041.00	39.00	147,610.50
March	1, "	2,496.65	7,954.40	30,200.70	74,979.05	4,387.75	12,041.00	41.00	132,100.55
April	1, "	2,496.65	7,954.40	23,344.55	70,318.80	1,784.70	12,041.00	90.00	118,030.10
May	1, "	2,496.65	7,954.40	13,223.35	68,830.80	511.50	12,041.00	194.00	105,251.70
June	1, "	0	5,458.25	7,027.30	68,114.10	406.40	14,367.20	62.60	95,435.85
July	1, "	0	5,458.25	28.45	55,495.50	406.40	19,385.75	16.65	80,791.00
August	1, "	0	5,458.25	0	54,418.00	406.40	25,275.90	16.65	85,575.20
September	1, "	0	5,458.25	0	54,418.00	406.40	26,994.25	16.65	87,293.55
October	1, "	0	5,548.25	4,293.65	58,460.80	406.40	27,191.30	161.65	95,827.05
November	1, "	0	5,458.25	4,355.90	65,899.40	406.40	27,740.45	16.65	103,877.05
December	1, "	0	5,458.25	4,355.90	69,231.30	356.10	29,033.05	16.65	108,451.25
January	1, 1943		5,354.10	4,355.90	60,260.30	356.10	26,445.40		96,771.80
February	1, "		3,682.95	1,409.30	43,475.60	356.10	24,924.00		73,847.95
March	1, "		2,220.25	431.05	26,295.25	101.45	24,473.75		53,521.75
April	1, "		0	0	3,382.65	0	24,206.65		27,589.30
May	1, "		0	0	636.50	0	23,823.30		24,459.80
June	1, "		0	0	636.50	0	24,483.25		25,119.75
July	1, "		0	0	636.50	0	23,000.10		23,636.60
August	1, "		0	0	636.50	0	24,364.50		25,001.00
September	1, "		0	0	636.50	0	25,391.85		26,028.35
October	1, "		0	0	1,186.00	0	25,310.95		26,496.95
November	1, "		0	0	1,769.50	1,336.00	24,406.95		27,512.45
December	1, "		0	0	1,769.50	1,769.20	15,821.30		19,360.00
January	1, 1944				1,279.90	1,582.60	14,474.40		17,336.90
February	1, "				379.75	0	13,326.20		13,705.95
March	1, "				0	0	13,326.20		13,326.20
April	1, "				0	0	12,661.80		12,661.80
May	1, "				0	0	13,684.95		13,684.95
June	1, "				0	0	16,833.75		16,833.75
July	1, "				0	1,297.25	18,056.65		19,353.90
August	1, "				0	5,088.40	19,153.55		24,241.95

[fol. 128] EXHIBIT P-18

Pennsylvania Coal Company

Maximum prices established for Anthracite Coal, FOB transportation facilities at mines of Pennsylvania Coal Company per OPA maximum price Regulation No. 112 and amendments thereto.

	Broken to Chestnut Inclusive	Pea	Buck	Rice	Barley
April 1, 1942 to Jan. 9, 1943	$6.75	$5.25	$3.75	$2.90	$2.15
to Nov. 24, 1943	7.30	5.75	4.20	3.35	2.50
to Feb. 1, 1944	8.00	6.45	4.80	3.85	2.85
to March 1, 1944	8.45	6.90	5.25	4.30	3.30
to June 1, 1944	8.00	6.45	4.80	3.85	2.85
	7.85	6.30	4.65	3.75	2.75

Vice President & Comptroller.

8/16/44—UH

[fol. 129] **Depositions**

Transcript of stenographic notes of depositions of Francis J. Brust, Fred V. Lynn, Roy W. Radcliffe, David D. Jamieson, Thomas J. Snyder, John T. McCormack and James Thompson, witnesses on behalf of the prosecutors in the above entitled matters, taken by and before Louis Kabot, a Supreme Court Examiner of the State of New Jersey, at Room 2301, Raymond-Commeree Building, 1180 Raymond Boulevard, Newark, New Jersey, commencing at ten-thirty o'clock in the morning, E. W. T., on Monday, August 21, 1944, pursuant to order granting leave to take depositions.

Appearances:

Collins & Corbin, Esqs., by Robert J. Bain, Esq. (present), counsel for prosecutors Independent Warehouses, Inc. and James Thompson.

Hobart, Minard & Cooper, Esq., by Duane E. Minard, Esq. (present), counsel for prosecutors Pennsylvania Coal Company and Erie Railroad Company.

Chandless, Weller & Kramer, Esq., by Ralph W. Chandless, Esq. (present), counsel for defendants.

It is stipulated and agreed by counsel for the respective parties that the depositions in the above mentioned cases be taken stenographically before Louis Kabot, a Supreme Court Examiner of the State of New Jersey, and that the signatures of the witnesses to their depositions be waived. [fol. 130] It is further stipulated and agreed by counsel for the respective parties that the depositions be taken jointly in the two cases, to be used in both cases.

Mr. Chandless: This stipulation shall be subject to the defendants' right to object to the scope of the depositions and also the procedure, except as above stipulated.

Mr. Bain: Any and all objections to the depositions to be made during the taking of them.

Mr. Chandless: Yes, or by motion to strike.

Mr. Minard: On behalf of the prosecutors this statement is made. Prosecutors' depositions were taken before Nicholas W. Bindseil, Supreme Court Commissioner, on March 22 and March 23, 1944, but owing to Mr. Bindseil's illness and subsequent death a transcript of those depositions was never made. Prosecutors' depositions are now being taken over again within the confines of the original depositions. Is that right?

Mr. Chandless: That is right.

Mr. Minard (Continuing): So far as possible to follow from recollection.

Counsel for prosecutors desire to offer in evidence at this time certain exhibits which were offered on the original taking of the depositions before Mr. Bindseil, and marked by him as Exhibits P-1 to P-16, inclusive, respectively. Prosecutors desire to re-offer those exhibits at this time, and to have them again marked as exhibits.

(The papers referred to were received in evidence and marked Exhibits P-1 to P-16, inclusive.)

Mr. Chandless: The defendants have no objection to them going into evidence, except that they desire to cross examine [fol. 131] with respect to them, and by cross examination we mean cross examining the witnesses who were produced to prove them on the original hearing.

Mr. Bain: The witnesses will be produced.

Mr. Minard: Yes. They are all here.

Mr. Chandless: On behalf of the defendants and in respect to the intervening prosecutor Erie Railroad, I desire

to make a statement for the record or an objection to these proceedings.

On May 13, 1944 I wrote the attorney of the Erie Railroad as follows—

Mr. Bain: That does not refer to Mr. Minard or myself?

Mr. Chandless: This refers to the Erie Railroad.

Mr. Bain: You say that you wrote counsel for the Erie Railroad.

Mr. Chandless: I wrote to Duane E. Minard, Hobart, Minard & Cooper, 1180 Raymond Boulevard, Newark 2, New Jersey, as follows:

"Dear Mr. Minard:

"I have yours of May 9th, 1944. I conceive that the function of the Stipulation would be to reduce to writing what transpired before the Court."

On May 15, 1944, Mr. Minard replied as follows:

"After certain statements in the first eight paragraphs of your letter of the 13th, you asked to be advised whether that——"

Mr. Minard: Wait a minute. Are you going to put the letter in evidence?

Mr. Chandless: I am making a statement, and you can add anything that you want.

[fols. 132-154] Mr. Minard: Don't you see the obvious unfairness of attempting to put in your side of the correspondence and not mine?

Mr. Chandless: It is your letter that I am putting in.

Mr. Minard: Well, why don't you put it in?

Mr. Chandless: You can add to it anything you want.

Mr. Bain: I object to any statement on the record from writings. If the writings are a proper subject of statement on the record, then the writings ought to go in.

Mr. Chandless: Well, in order to save time I will put in the following:

Mr. Minard's letter of May 2, 1944.
My letter of May 4, 1944.
Mr. Minard's letter of May 9, 1944.
My letter of May 13, 1944.
Mr. Minard's letter of May 15, 1944.

My letter of May 19, 1944.
My letter of June 20, 1944.
And my letter of July 31, 1944.

[fol. 155] FRANCIS J. BRUST, called as a witness on behalf of the prosecutors, being duly sworn according to law by the Examiner, testified as follows:

Direct examination,

By Mr. Minard:

Q. Did you testify on the former depositions in this case on March 22, 1944?

A. I did.

Q. At that time did you present as Exhibit P-1 a map bearing that marking, which is entitled "Map of Coal storage Plant, Scale 1"=20', January 11, 1944, F. J. Brust, Engineer"?

A. The scale is 1"=200'.

Q. Was this map a reproduction of another larger map, of which that was the correct scale?

A. That is right.

Q. So this is a reduced facsimile of the map and not drawn to scale?

A. That is right.

Q. And the purpose of this map was to show the Coalberg property, and the character and location of various coal floors and equipment?

A. Yes.

Q. And did you, from the larger maps, make a box on this Exhibit P-1, which showed the total track area, total plant area, and the unused area, with the total number of square feet involved in the tracks, of various capital letter indications as they exist on Exhibit P-9, which is the track agreement between the Pennsylvania Coal Company and the Susquehanna Railroad Company?

A. That is correct.

Mr. Minard: Now, I offer this as a picture of the Coalberg plant, not as a map drawn to scale.

It has already been received in evidence and we will make the note of it here.

You may cross-examine.

[fol. 156] Cross-examination.

By Mr. Chandless:

Q. I think that on your previous examination you testified that the radius of individual piles of coal which are represented by the circles is 120 feet. Is that correct?

A. Did I say 120?

Q. That is what you said the last time.

Mr. Minard: Don't you take his word for it. You just rely on your own recollection.

A. Well, they are approximately 120.

Q. The radius is 120 feet?

A. You mentioned radius. In fact, we can tell you exactly how much they are.

Mr. Minard: Here is a map to scale so you can tell him if he wants to know. I don't want you to accept his recollection of what you testified to.

A. (Continuing): In fact, there are 123½.

Q. That is the radius?

A. That is what you asked for, yes, sir.

Q. And by piles you mean the full circles, two of which appear on each floor?

A. That is right. The smaller circles on that part (indicating) marked "floor."

Q. And those circles represent the piles of coal?

A. That is right, those are circles that represent the piles of coal.

Mr. Minard: When you say "piles of coal," is it coal or coal floors?

The Witness: That is right, piles on the floor.

Mr. Minard: If it is full?

The Witness: If it is full.

Q. I think you also testified on your previous examination that the radius of the floor, and by floor we mean [fol. 157] the circles marked Floor A, B, C, D and E, each 235 feet?

A. That is right; approximately 235.

Q. And I believe that you testified that the pile of coal piled on the circles, with a radius of 120 feet, each would have a height of 120 feet, is that right?

A. No, I didn't say that.

Q. You didn't testify to that the last time?

A. That would be possible if it was piled at a 45 degree angle. I don't remember saying it.

Q. Do you remember being cross-examined as to what would be the height of the piles of coal?

A. I have a recollection.

Q. You have a recollection of it?

A. Yes.

Q. Do you recall what you said would be the height of these piles of coal?

Mr. Bain: I object to that. The witness is entitled to be confronted by what he said.

Mr. Chandless: You know, Mr. Bain, it is a physical impossibility for me to confront him with his previous testimony because of the inability to write it up. I have a right to ask him whether or not he testified to that at that time.

Mr. Bain: Have you a note showing that he did so testify?

Mr. Chandless: Yes. I have a note right here. I have a note on all the witnesses.

Mr. Bain: Do you have a note to that effect? If you have a note to that effect, all right.

Mr. Minard: Let us see the note first.

Mr. Chandless: I have it right here. The witness can see it right here (indicating), "Francis J. Brust, Engineer, Pennsylvania Coal Company."

[fol. 158] Mr. Minard: That is wrong there. The witness wants to understand that he is testifying from his personal knowledge, and he does not have to support any figures that you present.

Mr. Chandless: But he can testify to what he knows to be the fact now. That is where we disagree. This testimony here is supposed to be a reproduction, in so far as it may be possible, of the witness's previous testimony.

Mr. Minard: But it is up to the witness to decide.

Mr. Chandless: Then, if it were not true I would have a right to say that the man made a different statement the last time he testified.

Mr. Minard: But you would have to confront him with the testimony.

Mr. Chandless: I will resort to whatever method I see fit, to contradict him.

Mr. Minard: Let us not waste any more time. The witness does not have to answer any more questions except of his personal knowledge.

By Mr. Chandless:

Q. Mr. Brust, you do recall testifying in respect to the height of the piles?

A. I remember something about height. I don't remember any figure that I gave you.

Q. You do recall that we spent a little time trying to get from you a calculation as to the height of these piles at that time?

A. I don't think it was on the calculation that we spent so much time.

Q. What was it that we spent the time on?

A. On the weight of coal. That is where we spent a lot of time.

[fol. 159] Q. That had a bearing on height. Didn't you say that the weight of coal would affect the height of the pile?

A. No.

Q. Didn't you testify on the previous hearing what the height of these piles would be if the pile was loaded to a capacity of 120 feet?

A. No, I don't remember saying that.

Q. What would you concede the height of the piles to be, if they are loaded to capacity?

A. If there were piles there the highest you could load them would be approximately 65 feet.

Q. You say 65 feet approximately?

A. Because they cannot be loaded higher than the trim.

By Mr. Minard:

Q. What is the trim?

A. That is the mechanical apparatus that loads the coal.

Q. That is the maximum height of the trim?

A. That would be on the bottom of the trim.

Q. That is the highest the trim could lift?

A. The coal would reach the trim. It could not go any higher, because that is a mechanical apparatus.

By Mr. Chandless:

Q. The dotted circles represent what?

A. Those are large piles.

Q. Those are larger piles?

A. Sure.

Q. What is the radius of those piles?

A. Approximately 210.

Mr. Minard: He is asking you about the piles. You can't build a pile with a railroad track running through it.

Mr. Bain: I assume he means the radius of the floor space or the amount occupied by the piles.

[fol. 160] Mr. Minard: That is incorrect also, because he would have to maintain the tracks.

Q. There would be a pile on each side, with a radius of 210 feet?

A. On each side?

Q. Of the track?

A. Yes.

Q. I don't think I understand what you mean by the radius.

A. Half the diameter.

Q. Half the diameter of the entire dotted circle?

A. Of each circle.

Q. Let us put it this way: If the piles represented by the solid circle, as distinguished from the dotted circles, were loaded to capacity, how many tons of coal would there be in each one of those piles?

A. In each one; on each pile?

Q. In each one of the piles represented by the solid circle.

A. If they were loaded to capacity?

Q. Yes.

A. Well that would vary according to the size of the coal, but it would be approximately between twenty and twenty-five thousand tons.

Q. And there are ten such piles, is that right?

Mr. Bain: That is the total as of January.

Q. There are ten represented on this map?

A. There are ten symbols representing piles on that map.

Q. That would mean that in those ten piles there would be between two hundred and two hundred and fifty thousand tons, provided they were loaded to capacity?

A. Yes, if they were loaded to capacity.

Q. Calling your attention to the dotted circles, what would be the capacity of each one of those?

A. In these larger ones?

Q. Yes.

A. I think they are about the same, except not so high.

[fol. 161] Q. You would say that they would be, each one, between twenty and twenty-five thousand tons?

A. Approximately.

Q. Do you count this as four piles or two piles?

A. Two piles (indicating); this is one and that is the other (indicating).

Q. So that you would have twelve piles altogether?

A. Twelve piles.

Q. With a total capacity of between 240,000 and 300,000 tons, is that correct?

A. That is correct.

Q. Those piles are the only portion of this yard which is used for the storage of coal, is that correct? There is no coal stored anywheres else except in those twelve piles that you refer to?

A. So far as I know those symbols on the map indicate where coal can be stored.

Q. Are you correct in your statement that there are only twenty to twenty-five thousand tons in each one of the dotted circles, or each half of the dotted circles?

A. In the whole circle. I did not speak about a half. I say the whole circle.

Q. On your previous examination you testified on that subject, didn't you?

A. I don't recall if I did or not, on the contents.

Q. You computed the ground area of this layout, didn't you? Those are your figures?

A. What do you mean by the ground area?

Q. Didn't you compute the ground area of the various layouts on this plan?

Mr. Chandless: Haven't we an exhibit here which was prepared by this witness? Isn't he the witness who prepared that?

Mr. Minard: We have two exhibits that were presented by Mr. Lynn, showing the ground area of the different uses of the plant.

[fol. 162] Mr. Chandless: They were not computed by this witness?

Mr. Minard: Well, I don't think so. Mr. Lynn; they were prepared under his supervision and he checked them over and put the exhibits in evidence. They are Exhibits P-2 and P-3.

Q. When did you last visit this yard or plant?
A. I think it was in April.
Q. April, 1944?
A. 1944.

Mr. Chandless: That is all.

Redirect-examination.

By Mr. Minard:

Q. You refer to the floor as having a radius of 235 feet. You were referring to these segments of circles that are different from the circles which constitute the floor of the coal pile, weren't you?
A. That is right.
Q. And your radius is the radius of the machinery operating to fill those piles?
A. Of the loader?
Q. Of the loader.
A. Yes, sir.
Q. So that the coal is not piled in this segment of a circle, but is piled on floors within the complete circles themselves?
A. That is right, in those smaller circles (indicating).
Q. You were asked whether these piles are the only places used for stowing coal. That is true, as to the actual placement of the coal?
A. As far as I know.
Q. But other parts of this property are used in the operation of storing coal, are they not, including tracks, machinery, buildings, and all that sort of thing?
A. I don't quite understand you.
Q. The necessary duties of carrying on this storage operation requires additional land for tracks and other purposes not within these particular circles?
A. Oh, that is correct.

Recross-examination.

By Mr. Chandless:

Q. And those tracks, as I understand it, are also used by the New York, Susquehanna & Western Railroad for certain purposes?
A. I think that is part of the exhibit there, isn't it?

Mr. Minard: Yes, it is. That is correct.

Q. In other words, those tracks are not exclusively for this yard, are they?

A. That is marked on the exhibit, just what all the tracks are used for.

Q. I am asking you, they are used for other purposes by the New York, Susquehanna & Western Railroad, aren't they?

A. Not that I know of.

Q. What is it that you are talking about, that is marked on the exhibit?

A. I wonder if we can look at the exhibit.

Mr. Minard: Yes. It is all on here (indicating), and all on Exhibit P-9, too.

A. (Continuing:) In this block, in the lower left-hand corner, we endeavor to show who uses the tracks. Whether it is actually used exclusively by the plant and the railroad? By the plant and the railroad. I think that would answer your question.

Q. By the tracks being used exclusively by this plant, you mean that the tracks are used for the purposes of bringing in the cars from which the coal is unloaded?

A. The coal cars, that is right.

[fol. 164] Q. What else is at this plant aside from the loading machinery, these arms or derricks which take the coal and put it in the pile, and the tracks and the piles? What else is there?

A. In that area there?

Q. Yes.

A. Some unused ground.

Q. What else?

A. Did you itemize the tracks and the yard?

Q. I am asking you what physically there is.

A. Well, land.

Q. In other words, there are the piles of coal, the derricks or arms which load and unload the coal, and there are the tracks?

A. That is right.

Q. Mr. Minard referred to machinery. Is there any other machinery there?

A. Outside of what is there in connection with the actual unloading of coal, you mean?

Q. Yes.

A. I don't know. I don't operate that.

Q. You went down on the ground to make this plan, didn't you?

A. Yes.

Q. And if there had been anything else there you would have set it forth in your plan?

A. We tried to mark on there everything we saw there in relation to the storage of coal.

Mr. Chandless: That is all.

Redirect examination.

By Mr. Minard:

Q. There are buildings there?

A. These buildings (indicating).

Q. Is there an Erie freight office in that building? You didn't attempt to show me the buildings on this map?

A. No. The only buildings I have shown, I have shown the office building, but this building is in relation to——

Q. Where is that office building?

A. That one (indicating).

[fol. 165] Mr. Chandless: It refers to a building of about what size? What would you say is the size of that building?

The Witness: Of that office building?

Mr. Chandless: Yes.

Mr. Minard: Here is a house (indicating). That is called a house there (indicating.) There are several buildings here shown, 1, 2. 3, 4 and 5; four engine houses and one pump house.

The Witness: That is in relation to the storage of the coal.

Mr. Minard: And there is a locomotive house up there (indicating).

By Mr. Chandless:

Q. By that you mean a pump house?

A. A pump house.

By Mr. Minard:

Q. And there is a locomotive house there?

A. Yes.

By Mr. Chandless:

Q. That is for engines of the New York, Susquehanna & Western?

A. I don't know who uses it.

Q. The pump house that you refer to, what is that used for?

A. Used for water.

Q. And the water, that is used for what?

A. I am not too familiar with the operation of that plant.

Q. The water, that is used to wash the coal?

A. It can be used to wash coal.

Mr. Minard: We have exhibits showing that, already in.

[fol. 166] Q. The coal is washed at this plant?

A. I don't know. I don't know much about the operation of that plant, as I mentioned before.

Q. How big did you say the office building is?

A. I didn't say.

Q. You can give us the dimensions, can't you?

A. Yes.

Mr. Minard: Which is the office?

The Witness: Here (indicating).

A. (Continuing:) The answer is no, I can't give you the dimensions of it.

Q. Can't you scale them?

A. It doesn't show on there.

Mr. Chandless: All right.

Direct examination.

By Mr. Bain:

Q. Mr. Brust, some of this machinery is operated by electric power, isn't it?

A. I think it is.

Q. Do you know whether or not there are power lines from various parts of the property to carry the power?

A. There are power lines there, but I haven't got that located on any map.

Q. You don't know where they are, but you know that there are power lines there?

A. Yes.

Q. Outside of these circles indicated as storage piles?

A. Yes.

Q. The power lines are outside of the circles covering various parts of the land, within the yellow confines of the map?

A. That is correct.

Q. For the purpose of operating the plant would you have to walk to the different parts of the plant outside of these circles shown on that map?

A. Yes.

Q. A watchman has to make the rounds, look outside, all the time?

A. Yes, he does.

Mr. Bain: That is all.

[fol. 167] Cross-examination.

By Mr. Chandless:

Q. The loading or unloading, the operation of the plant, is accomplished by the different power houses which appear alongside the railroad tracks, the little square, is that right?

A. That is the engine house.

Q. That is the engine house?

A. Yes.

Q. How big are those engine houses?

A. Well, they are different sizes. Which one do you want?

Q. They seem to me to be all about the same.

A. That is a different size than this one here (indicating).

Q. About how big are they?

A. The smaller one is about 25 by 35.

Q. They appear within circles, is that right?

A. No, they don't.

Q. They appear within the floor, don't they?

A. No, sir. It is floor.

Q. They lay between the floor and the railroad tracks, is that correct?

A. That is correct.

Q. They are operated by power?

A. Yes.

Q. So far as you know, it comes in on power lines along the railroad tracks?

A. I didn't say along the railroad tracks.

Q. So far as you know the power lines travel along the railroad tracks?

A. I don't know.

By Mr. Bain:

Q. Is the plant lighted at night when it is operated after dark?

A. Yes.

Q. Are there electric poles all over the plant?

A. I don't know where the poles are located, but in order to light up the plant they would have to have them distributed.

Q. They are in the plant outside of the floor space occupied by coal piles?

A. Yes, they would have to be.

[fol. 168] By Mr. Chandless:

Q. Where are they?

A. Outside of the floors.

Q. Point them out on the map.

A. I can't point them out on the map because I didn't have them located.

Q. You are just guessing?

Mr. Bain: He knows they are not under the coal.

A. I didn't guess, because I said I don't know where they are located, but they are there, because I know they are there.

Fred V. Lynn, called as a witness on behalf of the prosecutors, being duly sworn according to law by the Examiner, testified as follows:

Direct examination.

By Mr. Minard:

Q. Mr. Lynn, I show you a tabulation dated March 17, 1944, and marked Exhibit P-2, N. W. B., by Mr. Bindseil's marking, and ask you if that was prepared under your supervision?

A. It was.

Q. What is your connection with the Pennsylvania Coal Company?

A. Secretary and real estate agent.

Q. How long have you been in charge of real estate and taxes and assessments of the Coal Company?

A. About eighteen years.

Q. Exhibit P-2, does that correctly show the land and improvement assessment areas, uses and taxes, in columns 1 to 7, inclusive, and also the land distribution of track occupancy of the Coalberg plant?

A. It does.

[fol. 169] Mr. Minard I re-offer that as Exhibit P-2.

(The paper referred to was received in evidence and marked Exhibit P-2.)

Q. Did you also have prepared under your supervision a statement headed, "Coalberg, N. J. 1944," marked Exhibit P-3, N. W. B., showing the tracks used by the storage plant, the tracks used exclusively by N. Y. S. & W. Railroad Company, the tracks used jointly by New York, Susquehanna & Western Railroad and the storage plant, with a notation that the New York, Susquehanna & Western is entitled to use all tracks?

A. Yes.

Q. Was that compilation made from an agreement of July 13, 1931, marked Exhibit P-9 in this case?

A. It was, yes.

Q. And those figures correctly show the areas of the lettered tracks, according to that agreement?

A. Yes, it does.

Mr. Minard I re-offer that in evidence as Exhibit P-3.

(The paper referred to was received in evidence and marked Exhibit P-3.)

Q. On P-2, where did you get that information about the assessed rate per square foot of land?

A. I got that from Mr. W. H. Rinke.

Q. Who is he?

A. He was secretary of the Board of Assessors in 1933. I think I got it from him on June 13th, at Rochelle Park, Saddle River Township.

Q. Have you been familiar with that assessment ever since?

A. Yes.

[fol. 170] Q. Has there been any change in the rate of that assessment?

A. No change at all.

Q. Or in the amount of the assessment shown here?

A. Just the same. That is for the land. When you say that there has been no change, there has been a change in the improvement valuation.

Q. This shows improvements $113,400. What year does that speak of?

A. You might say that is around 1942 or 1943.

Q. Had there been any change in this on March 17, 1944, when this was made?

A. No.

Q. Now, prior to 1940, that is, to and including 1939, this plant was operated by Pattison & Bowns, wasn't it?

A. That is right.

Q. And the coal in storage belonged to them and was their private property?

A. It was.

Q. And it was assessed by Saddle River Township as their personal property?

A. Yes.

Q. Do you remember what the assessment on the coal was, we will say, from 1939?

A. From my recollection, of course, it was on the same basis as our assessment, and it remained the same for a good many years. I would say around $193,000.

Q. Then, when they gave up the yard at the beginning of 1940 or late in 1939, there was no more of their coal there, was there, that is, except in storage under the Independent Warehouses?

A. I wouldn't know about that.

Mr. Miard: All right, go ahead, cross-examine.

Cross-examination.

By Mr. Chandless:

Q. Since what year is it that you have not paid any personal property tax on coal?

A. Well, we never paid any.

[fol. 171] Q. Since what year is it that no one paid any personal property tax on coal up there?

A. That I wouldn't know either, except from the records, as it appears.

Q. What years was that?

A. I couldn't answer that because I was never interested in that.

Q. Since 1940 you have paid no personal property tax on coal, or no one has paid any personal property tax on coal?

A. I would say offhand that is the correct date.

Q. Those taxes were about $12,000 a year?

A. I couldn't answer that, except hearing it discussed here.

Q. You knew it affected your company, didn't you?

A. No, not on the coal, I wasn't interested in the coal.

Q. You were not interested in the coal?

A. No.

Q. The stock of the Pennsylvania Coal Company is owned by the Erie Railroad, isn't it? Is that correct?

A. I would say that is correct.

Q. And your company is which one? I get these companies confused.

A. Pennsylvania Coal Company.

Q. You are the Pennsylvania Coal Company?

A. That is right.

Q. The Independent Warehouses rents this yard from you at a dollar a year, is that correct?

A. They lease it.

Mr. Bain: The lease speaks for itself.

The Witness: That is in the record.

Q. That is correct, isn't it?

Mr. Bain: The lease speaks for itself.

Q. Is there any secret about that?

A. No.

Mr. Bain: The lease is in evidence.

[fol. 172] Q. You are not ashamed of the fact that you rent it to them at a dollar a year?

Mr. Bain: Just a minute. I object. The lease is in evidence.

Q. You previously testified, Mr. Lynn, in the tax certiorari case, didn't you?

A. In the what?

Q. In the tax certiorari case.

Mr. Bain: I object, unless the witness is confronted with his testimony.

A. I don't believe so.

Mr. Chandless: May I have the record on that? Wasn't he there the first time we met, Mr. Minard?

The Witness: No. You met me a long time ago. I don't believe so, no.

Mr. Minard: He didn't testify in the case.

Mr. Chandless: He didn't testify in that?

Mr. Minard: No.

Mr. Chandless: I think that is all.

Roy W. Radcliffe, called as a witness on behalf of the prosecutors, being duly sworn according to law by the Examiner, testified as follows:

Direct-examination.

By Mr. Minard:

Q. Mr. Radcliffe, did I prepare for your consideration certain interrogatories, for your examination in these cases?

A. Yes, sir.

Q. And did you go over those to see whether they were in substantial accord with the questions that you were asked at the last hearing in this matter in March?

A. I did.

[fol. 173] Q. Did you write out the answers as nearly as you could recollect from your testimony, and reduce those questions and answers to writing and submit them to me for consideration at this hearing?

A. I did.

Q. Now then, what is your connection with the Pennsylvania Coal Company?

A. Vice-president and Comptroller in charge of the Accounting and Treasury Departments of the company.

Q. How long have you been connected with that company, and in what capacities have you served?

A. Over twenty-five years. I have served in various capacities, including that of auditor and secretary and treasurer.

Q. In what State is the Pennsylvania Coal Company incorporated?

A. The Commonwealth of Pennsylvania.

Mr. Chandless: I object to the witness referring to typewritten questions and answers. He is over twenty-one and appears to have average intelligence, and, certainly, he needs no memorandum to refresh his recollection.

Mr. Minard: You certainly know that we could submit this whole testimony on interrogatories, and we have been merely trying to stay within the limits of the previous hearing.

Q. Were is its principal office?

A. Dunmore, Pennsylvania.

Q. What is its business?

A. It owns, operates and leases anthracite mines in Lackawanna and Luzerne Counties in Pennsylvania. The Pennsylvania Coal Company mines and prepares anthracite coal from certain of its properties not under lease [fol. 174] to others, all of which it sells f.o.b. the mines to purchasers who ship it for their own account to various destinations.

Mr. Chandless: I object to the witness reading this, and that objection applies to every one of these answers which he reads from a memorandum.

Mr. Minard: We will agree that it applies to all of them.

Q. Does the Pennsylvania Coal Company own a storage plant in Saddle River Township?

A. Yes.

Q. When was that land acquired by the Pennsylvania Coal Company?

A. During the year 1901.

Q. For what purpose was it acquired?

A. It was purchased to provide a location convenient to tidewater markets for the storage of excess production

of coal during certain seasons of the year, in readiness for deliveries during the winter months when the demand normally exceeds production, and for emergencies caused by mining or transportation interruptions, bad weather or other conditions.

Q. What are the economic advantages of such storage facilities?

A. Anthracite coal is used mostly as a domestic fuel and during the winter months the demand is normally greater than the quantity currently produced at the mines. Anthracite coal is stored for the following reasons:

(a) Anthracite does not normally have a steady market for all sizes during all of the months of the year.

(b) Storage is necessary because of the lack of demand [fol. 175] at times for certain sizes of coal then being currently produced. The percentage of the various sizes produced through anthracite breakers can be controlled only within certain limits. Smaller sizes are produced regardless of every effort made to produce larger sizes which are ordinarily in greater demand. Therefore, storage is necessary in order that the current market may be supplied with the sizes which are then in demand. Otherwise the lack of demand for certain of the sizes during low consumption periods would cause more interruptions of operation than at present and serious deficiencies in supplies might easily result during winter months when demands for domestic fuel are at the maximum and when the demand is normally in excess of current production.

(c) The handling and loading and unloading of coal is more difficult in the winter seasons and may be done much more expeditiously in mild summer months. Coal is stored to insure, as far as possible, a constant supply for consumers.

(d) During World War I, and during the present World War, the demand for anthracite coal at tidewater has exceeded the available supply, and stored coal has provided a supplemental reserve.

(e) The need for coal storage has been demonstrated particularly during the present war, as shown by the following figures for the Coalberg plant.

I have got three years' tabulation, 1941, 1942 and 1943.

	1941	1942	1943
Gross Tons stored:	138,109.06	33,480.07	13,625.15
Gross Tons removed:	47,854.16	90,984.03	84,654.01

[fol. 176] These figures indicate that the war demands for coal at New York tidewater and elsewhere were so great that it was impossible to build up the stock piles as usual in 1942 and 1943, and also that except for a reserve supply at Coalberg the present shortage of anthracite coal would have been consideratly greater.

This is true of coal storage plants located on other railroads.

Q. Under normal conditions, are facilities for storage-in-transit for coal necessary to the ordinary course of the business of mining, transporting and distribution of anthracite coal?

A. Yes. In addition to the above mentioned reasons, there are others:

(a) Storage of coal in-transit in a public warehouse provides a supply to dealers and consumers who buy coal in advance for winter use, because they can hold the coal in commercial storage and finance the purchasees, if desired, by negotiable warehouse receipts, in the same manner that excess production of grain, foodstuffs or other seasonal commodities are stored and financed for use during seasons of no, or inadequate, production.

(b) Avoiding the necessity of car storage, and affording prompt unloading and release of railroad cars for the benefit of shippers.

Q. Is the practice of storage-in-transit for coal generally followed by the railroads and the coal shippers of the country?

A. Yes. It is the general practice and has been for years on all coal-carrying railroads, and with dealers and users of large quantities of coal. Such facilities are necessary competitive elements of coal transportation and sales.

[fol. 177] Q. What equipment has the Coalberg plant?

A. Equipment for loading, unloading and storage of coal.

Q. Since the land was acquired and the plant was constructed how has it been operated?

A. It was operated and used only for the storage of anthracite coal. On January 1, 1930, the Pennsylvania Coal Company leased its mines in Pennsylvania and the Coalberg plant to the Pittston Company, which company directly or through Pattison and Bowns, a subsidiary of The Pittston Company, operated the Coalberg plant for the storage of anthracite. On December 7, 1938, The Pittston Company surrendered the Coalberg plant to the Pennsylvania Coal Company.

At that time the Pennsylvania Coal Company was selling all of its coal f.o.b. mines. Therefore, the Pennsylvania Coal Company had no use for the storage facilities at Coalberg.

As of February 25, 1939 the Pennsylvania Coal Company agreed to operate the Coalberg plant for, and on behalf, and at the expense of the Trustees of the Erie Railroad Company, as a public service facility for shippers of prepared anthracite coal on Erie lines. The terms of that agreement, which is still in operation, are set forth in a written agreement dated July 10, 1939.

Q. I show you Exhibit P-4, with Mr. Bindseil's initials on it, the agreement just referred to. Is that a correct copy of it?

A. July 10, 1939, that is it.

Mr. Minard: I re-offer that in evidence as Exhibit P-4.

(The paper referred to was received in evidence and marked Exhibit P-4.)

[fol. 178] Q. Proceed. Go ahead with the description of the agreement.

A. To carry that agreement into effect, the Pennsylvania Coal Company, on June 20, 1939, leased the Coalberg plant and equipment to Independent Warehouses, Inc. on terms and conditions and for the purposes described in a written lease of that date.

Q. I show you Exhibit P-5, marked by Mr. Bindseil, and ask you if that is the agreement just referred to?

A. That is it.

Mr. Minard: I re-offer that as Exhibit P-5.

(The paper referred to was received in evidence and marked Exhibit P-5.)

Q. Proceed with the agreement.

A. Concurrently with the execution of that lease the Pennsylvania Coal Company made an agreement with Independent Warehouses, Inc., the terms and purposes of which are set forth in a written agreement of that date.

Q. That is May 24, 1940, isn't it?

A. No. That is June 20th. The supplement is dated May 24th. There were two leases dated the same date.

Q. I show you Exhibit P-6, with Mr. Bindseil's initials on it, and ask you if that is the agreement last mentioned?

A. That is right.

Mr. Minard: I re-offer that as Exhibit P-6.

(The paper referred to was received in evidence and marked Exhibit P-6.)

Q. Proceed.

A. A supplement to that agreement was executed on May 24, 1940.

Q. I show you Exhibit P-7, previously introduced and marked with Mr. Bindseil's initials, and ask you if that [fol. 179] is the supplemental agreement just mentioned?

A. Yes.

Mr. Minard: I re-offer that in evidence as Exhibit P-7.

(The paper referred to was marked Exhibit P-7.)

Q. Is the Coalberg plant still operated in accordance with those agreements and leases?

A. Yes.

Q. Are there any other existing agreements respecting the Coalberg plant?

A. There are two other existing agreements. An agreement dated June 12, 1940, between the Trustee of the New York, Susquehanna & Western Railroad and the Pennsylvania Coal Company for operating pumps and furnishing water for locomotives, and for billing, weighing and reporting on cars at Coalberg for the New York, Susquehanna & Western Railroad.

Q. I show you an agreement of that date marked Exhibit P-8 by Mr. Bindseil, and ask you if that is the agreement last mentioned?

A. That is right; that is correct.

Mr. Minard: I re-offer that in evidence as Exhibit P-8.

(The paper referred to was received in evidence and marked Exhibit P-8.)

Q. What is the other agreement that you mention?

A. An agreement dated July 30, 1931, between the New York, Susquehanna & Western Railroad, Pennsylvania Coal Company, The Pittston Company and Pattison & Bowns, Inc., covering the ownership, use, maintenance and operation of tracks at the Coalberg plant.

[fol. 180] Q. I show you an agreement of that date marked Exhibit P-9, with Mr. Bindseil's initials on it, and ask you if that is the agreement last mentioned?

A. That is it.

Mr. Minard: I re-offer that in evidence as Exhibit P-9.

(The paper referred to was received in evidence and marked Exhibit P-9.)

Mr. Minard: While I am on this I am going to ask a question that I had not submitted before.

Q. When did The Pittston Company and Pattison & Bowns go out of that agreement?

A. December 8, 1939, I believe it was.

Q. And since that time it has continued in operation as between the Pennsylvania Coal Company and the New York, Susquehanna & Western Railroad Trustee?

A. That is correct.

Q. Is the Coalberg plant suitable for any use other than the storage of coal?

A. It is not.

Q. Has the plant ever been used to your knowledge for any local or intrastate use?

A. No. It has always been and is now used exclusively for handling interstate shipments of coal, except the services we render to, and the tracks used exclusively or jointly by, the New York, Susquehanna & Western Railroad, and they are also services for the commerce of that railroad.

Q. Prior to February 25, 1939, and while the Coalberg plant was operated as a private storage facility, was the coal in storage assessed and taxed by Saddle River Township?

A. Yes, it was assessed each year, including 1939, and the taxes were paid by owners of the coal.

[fol. 181] Q. After the year 1939 was the coal in storage assessed and taxed by the Township?

A. Yes, but the assessments and taxes for 1940 and 1941 were contested on the ground that, since June 20, 1939, the coal was personal property stored in a warehouse of a corporation engaged in the business of storing goods for hire, and was therefore exempt from taxation under New Jersey law. The exemption was sustained and the assessments and taxes were set aside by the New Jersey Supreme Court on October 15, 1942. That decision was later affirmed by the Court of Errors and Appeals by opinion dated May 13, 1943.

Q. When did you learn of the ordinance of Saddle River Township to license the Coalberg storage plant and the storage business conducted there?

A. Between its introduction on January 13, 1943 and its adoption on January 25, 1943, we were informed of it by our attorneys and they were instructed to oppose it.

Q. Is there any other storage business in Saddle River Township subject to this ordinance?

A. Not to my knowledge.

Q. What is the effect of the ordinance on the Coalberg plant?

A. The Coalberg plant comprises 67.25 acres, or 2,929,410 square feet. The ordinance provides an annual license fee of ¾ of a cent "for each square foot of the total ground area of the place or premises • • • in or at which said business is conducted or carried on."

Since there is nothing in the ordinance limiting the area to be computed to the actual area occupied by stored coal, buildings and equipment, it might be construed by the Township officials to apply to the entire area of the property. In that case the annual license fee would be $21,970.57. Such an annual license fee, or any considerable part of it, would be absolutely prohibitive.

[fol. 182] Regardless of how the fee is computed the plant could not be operated as a transportation facility under such a tax burden. It would have to be discontinued.

The complaint on which Independent was convicted alleges the conduct of the business without a license on premises designated as "Block 106—D" of the assessment map. That parcel contains 2,730,296 square feet. At ¾ cents per square foot, the annual license fee on that parcel would amount to $20,475, which is the exact amount of the assessed valuation of that parcel.

Applied to 13,625.15 tons of coal put in storage, and 84,654.01 tons removed from storage in 1943, the annual license fee on that parcel shows the following rates per ton:

On the tons put in storage	$1.50 per ton.
On the tons taken out of storage	.24 per ton.
On combined in and out tonnage	.21 per ton.
The total gross revenue for storage and handling is only	.28 per ton.

Since land area, as a basis for assessment of this license fee, has no relation to the volume of business, tons in storage, or gross or net earnings, it is arbitrary and unreasonable, and the increased cost could not be absorbed nor passed on to the consumer. The application of this ordinance to the Coalberg plant would probably have the effect of closing it.

Q. How are the expenses of operating the Coalberg plant met?

A. Aside from the income derived from the services rendered to New York, Susquehanna & Western Railroad, which are deducted as credits from the gross expense of operating the plant, the only source of revenue to meet the public storage of coal is the railroad tariff charges to shippers of 14 cents per gross ton when the coal is put in [fol. 183] storage and 14 cents per gross ton when the coal is re-shipped out of storage. Between March 18, 1942 and May 15, 1943, this charge was 15 cents per gross ton in and 15 cents per gross ton out.

Q. Do you have charge of the accounts of the Pennsylvania Coal Company showing all expenses and the tonnage handled, for the purpose of determining the revenues from the operation of the Coalberg plant?

A. Yes. I submit a statement dated Februrary 16, 1944, entitled "Pennsylvania Coal Company, Statement of Operation of Coalberg Storage Plant from January 1, 1941 to December 31, 1943."

Q. I show you Exhibit P-10, with Mr. Bindseil's initials on it, which is that statement offered in evidence at the previous hearing, and ask you if that is it?

A. That is it.

Mr. Minard: I re-offer that exhibit in evidence as Exhibit P-10.

(The paper referred to was received in evidence and marked Exhibit P-10.)

Q. Does the Pennsylvania Coal Company own any coal stored at Coalberg?

A. No.

Q. Are there ceiling prices or other Governmental regulations on anthracite coal?

A. Yes.

Q. I show you, in reference to Governmental ceiling prices, a statement which you prepared, dated under date of August 16, 1944, entitled "Pennsylvania Coal Company, Maximum Prices Established for Anthracite Coal f. o. b. Transportation Facilities at Mine, Pennsylvania Coal Company, per OPA Maximum Price Regulation Number 112 and Amendments Thereto," and ask you if you prepared that statement?

A. I did.

[fol. 184] Q. Does that show when certain prices went into effect?

A. It does.

Q. They continue in effect until the next subsequent date when a new price is shown?

A. That is correct.

Q. Those are the official OPA prices at which purchasers buy this coal from you, which they store at Coalberg?

A. That is correct.

Mr. Minard: I am going to interrupt you long enough here to offer this exhibit as P-18.

Mr. Chandless: I object on the ground that it is not within the scope of the testimony given by the witness in the previous hearing.

Mr. Minard: It is in rebuttal of your testimony on coal prices, your witness Faust.

Mr. Chandless: I object on the further ground that the hearing in this matter was closed, and this is only for the purpose of reproducing the testimony which was adduced at the previous hearing. This is something new that is interjected at this time.

Mr. Minard: You offered the wrong prices, and we have a right to correct them.

(The paper referred to was received in evidence and marked Exhibit P-18.)

Q. Now, returning to the interrogatories, what are the present market conditions affecting supply and demand for anthracite coal?

A. The demand is in excess of production.

Q. What is the present and probable future effect of supply and demand conditions upon the quantity of coal [fol. 185] in the stock piles at Coalberg?

A. Until the war is over, and probably for some time thereafter, production is apt to lag behind demand.

Q. Has any department or agency of the Federal Government issued any rulings regarding the status of employees of the Coalberg plant?

A. Under date of December 8, 1941 the General Counsel of the Railroad Retirement Board ruled that the employees of the Coalberg Storage plant were under the Federal Railroad Retirement and Railroad Unemployment Insurance Acts, the same as railroad employees engaged in Interstate Commerce.

Q. I show you a photostatic copy of that letter, marked Exhibit P-11, with Mr. Bindseil's initials, and ask you if that is a correct photostatic copy?

A. That is it.

Mr. Minard: I re-offer that as Exhibit P-11.

(Paper referred to was received in evidence and marked Exhibit P-11.)

Q. How many persons are now employed at the Coalberg plant?

A. Six.

Q. How many were employed there at the time of the taking of these depositions in March?

A. Ten.

Q. Who owns the capital stock of the Pennsylvania Coal Company?

A. The Erie Railroad Company owns all of the outstanding capital stock of the Pennsylvania Coal Company.

Q. Now, Mr. Radcliffe, I show you a statement entitled "Statement of Coal in Storage at Coalberg Storage Plant by Size in Net Tons, as of the 1st of Each Month, from January 1, 1942 to August 1, 1944," and ask you if you [fol. 186] prepared that statement?

A. I had it prepared.

Q. And it shows exactly what the title states, is that right?

A. That is correct.

Mr. Minard: I offer this in evidence as Exhibit P-17.

Mr. Chandless: I object on the ground that it is not within the scope of the witness's previous testimony, and that the hearing was closed, and, consequently, the exhibit is not evidential at this time.

Mr. Minard: In answer I say that this is rebuttal to testimony of witnesses offered by the Township, attempting to compute certain values on hypothetical quantities of coal, and it seems to be advisable to put in evidence the actual quantities of coal in storage, in order to deal with those hypothetical computations.

Mr. Chandless: You had a statement of the amount of coal in storage?

Mr. Minard: No, we didn't.

Mr. Chandless: Is it different?

Mr. Minard: We never put one in.

Mr. Chandless: This witness himself testified here.

Mr. Minard: No, he didn't.

Mr. Chandless: As to the quantity of coal in and out.

Mr. Minard: Well, that is different. That did not relate to any date.

Mr. Chandless: He gave the years.

(The paper referred to was received in evidence and marked Exhibit P-17.)

Mr. Minard: Cross-examine.

[fol. 187] Cross-examination.

By Mr. Chandless:

Q. Mr. Radcliffe, you have read your answers to your testimony; the answers which you have given here today you have read from a paper that was prepared by Mr. Minard, is that correct?

A. I have read part of my testimony from a record which I have prepared myself after consultation with my attorney in Scranton.

Q. What part didn't you read?

A. The part that it wasn't necessary for me to read.

Q. But there were parts of your testimony that it was necessary for you to read?

A. There were parts of my testimony which it was necessary for me to read.

Q. Can you tell us generally what those parts were which it was necessary for you to read?

A. Parts relating to dates and figures in general, which I couldn't possibly carry in my head.

Q. Didn't you read the answers in respect to the setup of the Pennsylvania Coal Company and the purpose of the business and how the business functions? Didn't you read all of that?

A. I read part of it.

Q. Why was it necessary for you to read that?

A. Well, there are certain dates that I couldn't keep in my mind.

Mr. Chandless: I move that the witness's testimony be stricken out on the ground that it is not properly taken. He used a paper to refresh his recollection, without there being anything shown to warrant the use of such paper.

By Mr. Minard:

Q. Mr. Radcliffe, the paper to which you referred for detailed or technical information is a paper which you [fol. 188] prepared and sent to me with your letter of August 18, 1944, according to my request that you compile the data in accurate detail and be prepared to testify to it in accordance with certain interrogatories which I submitted to you? Is that right?

A. That is correct.

Q. What you have referred to today is what you wrote yourself and sent to me for consideration?

A. That is correct.

Mr. Chandless: And Mr. Minard changed it?

Mr. Minard: No, I didn't change a word.

The Witness: No, sir.

Mr. Chandless: Why was it necessary to send it to Mr. Minard?

The Witness: I returned it to him as a matter of record. Mr. Minard I asked him for it.

By Mr. Chandless (continued):

Q. Did you get it from him originally?

A. No.

Q. You say this was August, 1944, is that correct?

Mr. Minard: That is the date it was sent to me.

Q. You testified in the previous hearing?

A. Yes.

Q. Is your testimony here today the same as at that previous hearing?

A. To the best of my knowledge it is.

Q. You had your answers all prepared in written form at the previous hearing too?

A. That is correct.

Q. Did you compare these answers with the answers that you gave at the previous hearing?

A. Yes, sir.

[fol. 189] Q. So, what was the need of these communications back and forth between counsel and yourself, if there were no changes in your previous testimony? Did you change any of your previous testimony, since you previously testified?

A. Not to the best of my knowledge.

Mr. Chandless: I will repeat my motion, that his testimony should be stricken out.

Q. The factual situation at the Saddle River plant has been the same for years, hasn't it, the physical setup?

Mr. Bain: For how many years do you mean? I object on the ground that it is indefinite.

Q. For the past ten years, the physical setup?

A. What do you mean, for the past ten years, the physical setup?

Q. You told us all about how this plant operated. Now I am asking you whether or not——

A. The plant structure and the equipment that they have now is substantially the same as it has been for a number of years.

Q. It has been the same since 1913, is that correct?

A. I believe it is.

Q. The corporate setup is the same now as it was in 1941, isn't it?

A. What do you mean by corporate setup?
Q. The setup of these various corporations.
A. Yes.

Mr. Minard: You are referring now to the Erie and the Independent and the Pennsylvania Coal Company?

Mr. Chandless: The various corporations which are involved in this case.

[fol. 190] Mr. Minard: I think they ought to be specified, and I don't think the witness ought to answer unless he has them specified.

Q. Pattison & Bowns is controlled by United States Distributing Corporation, isn't that correct?
A. I can't answer that.
Q. You offered in evidence Exhibit P-11?
A. That is correct.

Mr. Minard: That is a letter he received from somebody else. He didn't write it.

Q. United States Distributing Corporation is controlled by The Pittston Company, isn't that correct?
A. I can't answer that.
Q. The Pittston Company is controlled by the Virginia Transportation Company, isn't that correct?
A. I have no knowledge on that.
Q. The Virginia Transportation Company is controlled by the Chesapeake & Ohio Railroad, isn't that correct?
A. I can't answer that.
Q. You do know that the Pennsylvania Coal Company is controlled by the Erie Railroad?
A. That is correct.
Q. In other words, you are what officer of the Pennsylvania Coal Company?
A. Vice-President and Comptroller.
Q. You do know that you are controlled by the Erie Railroad Company? That is what is meant by control, ownership of your stock?
A. That is correct.
Q. But you don't know that the Erie Railroad Company is controlled by the same people as Pattison & Bowns and The Pittston Company?
A. They are not.

Mr. Minard: They are not. They went through reorganization and washed all those fellows out.

[fol. 191] Q. Then I understand that your Exhibit P-11 is incorrect?

Mr. Minard: No.

A. Exhibit P-11 is an opinion of the General Counsel of the Railroad Retirement Board.

Mr. Minard: The only purpose of P-11 is to show that this plant and the employees are under the Federal Laws, because it is engaged in a transportation service. That is all that is for.

Mr. Chandless: You are also bound by your exhibits.

Q. You testified in the tax certiorari matter, didn't you?

A. I believe I did. I believe I was here.

Q. Now, at that time I think you described the operation of this plant and told us that this coal was shipped in to await orders for future delivery.

Mr. Minard: I object to the question. That is the only testimony he has ever testified to in that case (indicating). Here is the testimony (indicating).

Mr. Chandless: I am asking him a question. He can answer the question yes or no.

Mr. Bain: What is the question?

Mr. Minard: That time refers to the tax case, and if you will refer to the hearings in March of this year——

Q. Did you testify to that at that time?

Mr. Minard: At what time?

Q. In the hearing in the tax certiorari case?

[fol. 192] Mr. Bain: I object on the ground that he is entitled to be confronted with the testimony given.

Mr. Chandless: Let him testify.

Mr. Bain: No, I object.

Mr. Minard: I am going to let the witness examine the record, and if he finds that he did, then to read what he testified to, and if he finds he didn't he can answer the question no. He can examine the record to see what it is.

Mr. Chandless: This man is over twenty-one years of age. He is an intelligent witness and he can state whether he did so testify.

I will withdraw the question.

Q. Why is this coal shipped into Coalberg?
A. For purposes of storage.
Q. Why do they store it there?
A. For different purposes.
Q. Well, tell us the purposes.
A. Well, to be held for future use.

Mr. Bain: Isn't that what most storage it for?

Q. How long is the coal normally there?
A. That varies.
Q. Give us the various dates?
A. I can't give you that.

Mr. Bain: Is that as of the present time, a year ago, or ten years ago?

Q. What is the average period of time that the coal is in there?

Mr. Bain: During what period. I object unless the period is specified.

[fol. 193] Q. Can you answer the question?
A. What was the question?
Q. The average period of time that the coal remains there after shipment in there?
A. I can't. That would vary.
Q. What was it in 1941?
A. I couldn't tell you.
Q. The charge is made to unload the coal there of 14 cents per ton, isn't that correct?

Mr. Minard: I object to that. The tariff is in evidence and it speaks for itself.
Mr. Chandless: I am cross-examining the witness.
Mr. Minard: He didn't testify to that on direct.
Mr. Chandless: Yes, he did testify to that.
Mr. Minard: The tariff will speak for itself.
Mr. Bain: You put in the fourteen without mentioning the fifteen.

Q. Isn't that correct?
A. Yes, that is correct at the present time.
Q. At one time it was 15 cents a ton?
A. That is correct.
Q. That is the charge for unloading the coal?

Mr. Minard: I object to that. That is not correct. That is for the storage and unloading, and you know it, and the tariff is in evidence, which shows it. I don't want you to nail the witness down to something which is not so.

A. The tariff describes the services performed for the rate. I am not familiar with the tariff.

[fol. 194] Q. Who is this 14 cents a ton paid to?

A. I don't know. I think it is paid—I am pretty sure it is paid under the tariff of the Erie Railroad.

Q. Then 14 cents a ton is the charge to re-load it, is that correct?

A. That is correct.

Mr. Minard: Wait a minute. That is a part of the tariff charge.

Q. Now, the coal may remain at that yard for two years and then be re-shipped without any new rate being charged against it? That is a continuation of the old rate? Isn't that the system?

A. I am not familiar with the details on that.

Mr. Minard: The tariff so provides.

Mr. Chandless: That is admitted?

Mr. Minard: Certainly. That is a through rate from point of origin to final destination.

Q. Now, I think you testified today that the yard was operated for the purpose of keeping a stock on hand as a supply when the mines might be closed. Isn't that correct?

A. That is correct.

Q. And to accumulate a supply to meet greater orders than the mines are able to fill at the time cold weather might come in, is that correct?

A. That was another reason given, yes.

Q. How often do you run up against those kinds of situations? The coal business is seasonal.

A. To a certain extent it is.

Q. In other words, the demands are heavier in the cold weather?

A. That is right.

Q. So the yard is loaded up in the summertime, is that right?

A. Not always, normally.

Q. Give us the normal conditions. That is, what you [fol. 195] mean by that. In other words, the coal is shipped in in the late spring and during the summer and held there for winter orders?

A. It is shipped in when there is no demand for certain sizes.

Q. And you know, as a matter of fact, that without any increase in the railroad rate it can be held there a second year? Isn't that true?

A. Well, I am not familiar with the tariff.

Q. You don't mean to say that in this business, which is entirely dependent on this setup, you can't tell us about the tariff?

Mr. Bain: I object to the question on the ground that it assumes a fact that is not in evidence, being entirely dependent on the coal pile. That is just nonsense.

Mr. Minard: This is just only a plaything.

Q. You are not familiar with that setup at all? You don't know how it operates?

A. I am not familiar with the operation at all, generally speaking.

Q. You don't know how long the coal stays there? You just know the normal system; is that right?

A. That is correct.

Q. You put a number of agreements into evidence here today, didn't you?

A. Yes.

Q. In one of which the Erie Railroad assumes all the costs of operation, isn't that correct?

A. Yes.

Q. For the purpose of getting the coal business?

A. I don't know for what purpose.

Q. Doesn't the agreement so state?

Mr. Bain: I object on the ground that the agreement speaks for itself.

[fol. 196] Q. You are Comptroller of the company and you don't know what was put in that agreement which is in evidence?

A. We have a thousand agreements, and it is impossible to carry them all in my head.

Q. Isn't that in the agreement which was put in evidence?

Mr. Bain: I object on the ground that the agreement speaks for itself.

Q. Do you want to look at it? You know it is in there.

A. No, I don't.

Mr. Bain: I object to the question again.

Q. Now, in the tax certiorari case you found that you did testify, didn't you?

A. I testified in this particular case here.

Q. Referring to your testimony at Page 39; do you find your testimony on Page 39?

A. Yes.

Q. At that time I showed you a letter from Pattison & Bowns and asked you whether or not it refreshed your recollection. Isn't that correct?

A. Yes, sir.

Q. You said at that time that Pattison & Bowns had no authority to say that you operated the plant?

Mr. Minard: Wait a minute. Read your answer there.

A. (Reading:) "No. I had nothing to do with this. I don't know anything about it. I was never connected with Pattison & Bowns."

Q. What is the next? Go on, if you will.

A. That is the end of my answer.

Mr. Minard: That is the end of his answer.

[fol. 197] Q. "So you say, then, that the prosecutor, Pattison & Bowns, had no authority to say that you people operated that plant?" And the answer is what?

A. (Reading:) "I don't know anything about that."

Q. Now, as a matter of fact, Pattison & Bowns were controlled by the same people as you were? That is right?

A. That is not right.

Q. Didn't the Railroad Retirement Board find that is so?

Mr. Bain: I object to it.

A. No. The Railroad Retirement Board did not find it so.

Mr. Bain: The question is entirely improper.

Q. You offered in evidence Exhibit P-11 didn't you, when you just testified a little while ago?

A. Yes, sir.

Q. Now, when you testified in the tax certiorari proceedings you didn't tell us anything about this agreement with Erie, did you?

Mr. Minard: They were not in issue.

Mr. Bain: The question is objected to on ground that it is incompetent, irrelevant and immaterial. The examination is on the previous testimony now. It has nothing to do with this case. It is just a question that has no effect.

A. The answer is no.

(At this point a recess was taken for lunch.)

[fol. 198] Afternoon Session

Roy W. Radcliffe resumed the stand and testified further as follows:

Cross-examination (continued).

By Mr. Chandless:

Q. No mention was made of these agreements in that proceeding at any time, was there?

A. Not to my knowledge.

Q. I call your attention to Exhibit D-1, which appears to be the price list of Pattison & Bowns, and ask you whether you can tell us if that price list is correct in every detail?

Mr. Minard: I object to that. That is not his price list.

Mr. Chandless: If he knows.

A. Do you want me to tell you whether or not it is the OPA ceiling price in effect on that date?

Q. Whether that is the price list of Pattison & Bowns.

A. I am not an officer of Pattison & Bowns. I don't know.

Q. You don't know?

A. No.

Q. Are those the OPA ceiling prices in effect on that date?

Mr. Minard: That would not apply because these are Pattison & Bowns' prices, and all he knows is mine prices.

A. Those are the OPA ceilings in effect on that date generally.

Q. At Saddle River Township?

A. At the mines, f. o. b. transportation facilities.

Mr. Minard: You are referring now to what exhibit?

[fol. 199] Mr. Chandless: I am referring to Exhibit D-1.

Mr. Minard: That is not so.

Mr. Chandless: Let the witness testify. His answer was that it is.

The Witness: They are the maximum prices established for anthracite coal f. o. b. transportation facilities at mine.

Q. In other words, Exhibit D-1 is the same as P-17, is that right?

A. That is correct.

Mr. Minard: So far as that date is concerned.

Q. Of course, onto this price goes the cost of transportation from the mine, mine to Saddle River Township? Is that correct?

A. That is correct.

Q. That is about how much a ton?

A. I don't recall.

Q. And there is also the Government tax on each ton?

A. Whatever costs there are added to this f. o. b. mine price, any further costs.

Q. What is that Government tax?

A. I don't know.

Q. It is four cents a ton?

A. I don't know.

Q. There was never any license applied for, for any area of Saddle River Township?

A. I don't know.

Mr. Minard: I thought that was what you convicted these people for.

Q. You don't know?

A. That is correct.

Q. You never applied for a license for that area where the coal was stored?

Mr. Minard: He just said he didn't know.

[fol. 200] A. I don't know.

Mr. Chandless: I just want to get it on record.

Q. You testified that it would cost you how much money if you applied for this license?

Mr. Bain: If who applied for the license? The Pennsylvania Coal Company?

Mr. Chandless: This witness testified that it would cost a given sum of money for this license fee, and that would be prohibitive and would put them out of business. I am asking him whether that is so, if he did so testify.

The Witness: I did not.

Q. Didn't you compute the amount of license fee that was chargeable in this case?

A. I did not, and I didn't say it would put us out of business.

Q. Your words were that you would have to discontinue the plant?

A. That is correct.

Q. If you applied for a license for the area where coal appears on Exhibit P-1, as subject to be stored, that would be a license for what area?

A. I don't understand your question.

Q. You know that Exhibit P-1 is the layout or diagram of the yard which your company owns in Saddle River Township, is that right?

A. Is that the map?

Q. Yes. How many square feet are involved in that area where coal is actually being stored, according to P-1?

A. I can't answer that.

Q. Isn't it a fact that it is 630,000 square feet?

A. I can't answer that.

Q. Would you say that 630,000 square feet is wrong?

A. I don't know.

[fol. 201] Mr. Minard: He said he couldn't answer.

Q. So you don't know how many square feet are necessary to store the coal?

A. That is correct.

Q. If you got a license for 630,000 square feet your license fee would be about one-third of what was normally paid for property tax, is that right?

Mr. Minard: I object to it as irrelevant.

A. I don't know.

Q. About $12,000 a year was paid in personal property taxes on coal in Saddle River Township?

Mr. Bain: I object to the question on the ground that it assumes a fact that is not true.

Q. About $12,000 in taxes was paid on coal up to 1939, is that right?

A. That is in the statement there.

Mr. Minard: He didn't say they paid any taxes.

Q. You said they were paid?

Mr. Minard: Taxes were paid by the owners of the coal.

Q. Those taxes amounted to about $12,000 a year, is that right?

Mr. Minard: How does he know?

A. Yes.

Q. About $12,000 a year?

A. I think it is approximately $12,000. The statement is there.

Mr. Minard: Do you want the exact amount?

[fol. 202] Mr. Chandless: It is already in the record.

Mr. Minard: What are you padding the record for?

Mr. Chandless: I want to find out whether the witness is trying to help us or confuse us; if he admits that the personal property tax is $12,000.

Mr. Minard: He doesn't do anything of the kind.

Mr. Bain: I don't think it ever reached $12,000 there. I think it was up to $11,350, something of that sort.

The Witness: That statement is in there.

Q. You compiled a lot of figures or figures were compiled under your direction with respect to areas at this yard, weren't they?

A. With respect to areas?

Q. Those are your exhibits that you offered in evidence as to the areas, the tracks and so on?

A. No, sir.

Q. You are familiar with those figures, I mean? You don't know whether these figures are correct or incorrect?

A. I do not.

Q. You never gave any consideration to applying for a license for the area actually used for the storage of coal?

A. Not to my knowledge.

Q. You would not say that would be a whole lot less than the personal property taxes which had heretofore been paid?

A. I can't answer that question.

Q. This charge of 14 cents a ton which is paid there, that charge has no relevancy to the length of time that the coal remains up there, has it?

A. I am not familiar with the tariff. I can't answer that.

[fol. 203] Q. What do you understand that is?

Mr. Minard: The tariff speaks for itself and it is in evidence.

Q. As far as you know, then, there is no charge made for coal remaining a month, six months, a year, or five years?

A. I have no knowledge.

Q. You have no knowledge?

A. No.

Q. A considerable part of the coal at this yard is sold in the northern section of New Jersey, isn't that correct?

A. I don't know that, either.

Q. You would not say it is not so?

A. I can't answer that. None of the coal belongs to the Pennsylvania Coal Company.

Q. You know enough about the coal business to know that Pattison & Bowns does business with pretty nearly all the coal dealers in northern New Jersey?

A. I don't believe that, I can't answer that question.

Q. You don't know?

A. I never had any access to any Pattison & Bowns' sales records.

Q. The year 1941 was a subnormal year, isn't that correct?

Mr. Bain: With respect to what do you mean, Mr. Chandless?

Mr. Chandless: So far as the coal business is concerned.

Mr. Bain: So far as the coal stored at the plant, do you mean?

Q. In your previous testimony, when you testified here before, you testified that the year 1941 was a year below normal so far as business went, is that correct?

Mr. Minard: I object to that question. There is no record that he testified to that.

[fol. 204] Q. Yes, no, or I don't know. I suppose that is the answer.

A. What do you mean by "business"?

Q. Coal business.

Mr. Bain: Mined or sold?

Q. You were having your troubles in 1941, weren't you?

A. What do you mean, troubles?

Q. I think you testified on direct-examination now of being troubled because of the war, in the coal business.

A. I didn't testify there was considerable trouble.

Mr. Bain: Trouble in getting enough coal in to supply the demand in the Metropolitan District.

A. The supply is subject to the demand at the present time.

Q. Is that trouble?

A. No, I wouldn't say that is trouble.

Q. That condition was true in 1941 also, isn't that so?

Mr. Minard: What condition?

Q. That the demand exceeded the supply?

A. That is correct.

Q. Of course, the same thing is true of 1942 and 1943?

A. That is true.

Q. Consequently the figures on P-10, covering 1941, 1942 and 1943, do not represent normal conditions, do they?

Mr. Minard: In what respect?

Mr. Bain: The amount of coal they held at any particular time at the plant? The amount of coal mined?

[fol. 205] Q. The years 1941, 1942 and 1943 were not normal years so far as the coal business went, were they?

Mr. Bain: Are you speaking of coal mined, coal put in storage, coal stored?

Q. So far as your business of the Pennsylvania Coal Company was concerned?

Mr. Bain: Their business is mining coal. Is that what you mean? If so, that is entirely irrelevant.

A. I wasn't storing any coal in any one of those years.

Q. I didn't say you did. You know something about the coal business?

A. Yes, sir.

Q. You told us that 1941, 1942 and 1943 were subnormal years.

A. No, sir, I didn't.

Mr. Bain: You said that certain figures showed an abnormality.

Q. In those years the demand exceeded the supply, isn't that correct?

A. That is correct.

Q. By "supply" you mean what?

A. By supply I mean the ability of the producers to mine coal.

Q. Consequently, P-10 does not reflect three years of normal conditions?

Mr. Minard: I object to it unless you specify what normal conditions you refer to. Are you talking about mining?

Mr. Chandless: He knows what I mean; where the business is able to supply the demand.

A. I still don't understand your question. I am not hedging. I want to answer your question to the best of my ability.

[fol. 206] Q. The statement P-10 shows that 13,625.15 tons of coal came in during the year 1943?

A. That is correct.

Q. And 84,654.01 went out?

A. That is correct.

Q. Simple mathematics tells us that you could not continue to do business that way, could you, because there is more going out than is coming in? Apparently I have to lay down some simple mathematics.

Mr. Minard: That is not their business.

Q. Is that correct?

A. The Pennsylvania Coal Company is in the business of mining and selling coal. It has no connection at all with the amount of coal unloaded or reloaded at the Coalberg Storage Plant.

Q. You told us that a number of times. Will you tell me something about the coal business? Say that you have a

coal yard existing at Saddle River Township, and there are 13,000 tons that come in and 84,000 tons go out, would you say that is a normal, abnormal or subnormal year?

Mr. Bain: With respect to what? All that the question raises is the necessity for storage.

Q. Is that the way the yard is ordinarily operated?

A. The yard is operated for the purpose of storing coal when the supply is in excess of the demand.

Q. That means that you have to ship in as much or more coal than you ship out, isn't that true?

A. No, that is not true.

Q. How do you ship it out unless you ship it in?

Mr. Bain: That is what storage is for, my dear man.

[fol. 207] Q. By storing it? Right?

A. I can read you part of my testimony. That is all covered.

Q. You know more about the coal business than I do.

A. Yes, sure.

Q. Let me have a little of that information.

A. I am perfectly willing to tell you anything I am able to tell you.

Q. You take care of a condition like that by storage, right?

A. What condition?

Q. When they deliver and ship out 84,000 tons, when only 13,000 tons come in?

A. The tonnage in and out is shown on this exhibit.

Q. The out on this exhibit is what?

A. 84,654.01.

Q. For the three years it is what, out?

A. Altogether?

Q. Yes.

A. Around 220,000 tons.

Q. And what came in?

A. Around 180,000.

Q. You shipped out how many tons more than you shipped in?

A. I don't know. It is in there.

Mr. Bain: It is a matter of subtraction.

A. (Continuing:) About 40,000.

Q. You had coal in storage there, didn't you?

A. Coal in storage at all times during this three-year period.

Q. You had 40,000 tons beginning 1941?

A. Not necessarily. Beginning 1941 we had in excess of that.

Q. This statement does not show the amount of coal on storage there?

A. It does not.

Q. It does not show how much coal was on storage at the end of 1943, does it?

A. It does not.

Q. What would you say is a normal year for the amount of coal to come into Coalberg, the amount to be shipped in?

A. I couldn't say.

[fol. 208] Q. Your engineer testified that the capacity of the yard is between 240,000 and 300,000 tons. At certain times of the year you reach capacity there, in a normal year, don't you?

A. We have not reached capacity for a good many years.

Q. So these three years do not reflect normal years?

Mr. Minard: It is the same old question.

Q. Do they or don't they?

A. Well, I can't say what a normal year is.

Q. A year where the demand exceeds the supply.

A. What might have been a normal year ten years ago would not hold true today.

Q. Isn't your difficulty today because of the war conditions, the shortage of labor, and a great many factors that go into limiting your production?

A. Just the same as it does every other business man. I don't know what you mean by difficulties.

Q. You have told us that your business is not normal today; that the demand exceeds the supply. That is not normal, is it?

A. Do you mean the business of mining coal?

Q. The business of selling the coal. You mine it and sell it, don't you?

A. Mine the coal and sell the coal.

Q. Do you say that is a normal condition, where the demand exceeds the supply?

A. Well, it might be.

Q. When was the last time that you had conditions like that in the coal business, like the present conditions?

A. Well, I don't recall, but we have oftentimes been in the position of being way behind with our orders, like we are now, in the case of extremely cold weather.

[fol. 209] Q. That is for a limited period of time?

A. That is for a limited period of time.

Q. You have been in this present condition for some three or four years?

A. That is right.

Mr. Minard: What condition are you referring to?

The Witness: Demand in excess of supply.

Q. All of which means that the amount of coal presently at Coalberg is necessarily small, because the demand exceeds the supply, isn't that true?

A. That is true.

Mr. Minard: Is that always true?

Mr. Bain: Doesn't it depend somewhat on the rapidity of movement?

Mr. Chandless: Just a minute. I am doing the cross-examining.

Q. That condition only otherwise occurs in periods of very extreme cold weather, for a short time?

A. Or strikes or other interruptions in the mining of coal.

Q. Which ordinarily does not run for any four-year periods?

A. I hope not.

Mr. Chandless: That is all.

David D. Jamieson, called as a witness on behalf of the prosecutors, being duly sworn according to law by the Examiner, testified as follows:

Direct-examination.

By Mr. Minard:

Q. Mr. Jamieson, did I submit a series of interrogatories to you for preparation of information desired on this examination?

A. You did.

[fol. 210] Q. Did you supply the answers to those questions?

A. I did.

Q. Is the Erie Railroad Company a common carrier in Interstate commerce, subject to the Act to Regulate Commerce and the jurisdiction of the Interstate Commerce Commission?

A. Yes, it operates railroad lines in six States between New York and Chicago.

Q. What is your relation to the Erie Railroad Company?

A. I am Coal Freight Agent of the Erie Railroad Company, and am familiar with the tariffs, rules, regulations and other matters relating to the transportation of coal over the Erie lines.

Q. Are you familiar with the location and operation of the Coalberg Coal Storage plant?

A. Yes, and I have been familiar with it during the past twelve years.

Q. What has been the history of that plant since you have known it?

A. Prior to February 25, 1939 it was operated and used by various coal companies as private storage for their seasonal excess coal supply.

Effective February 25, 1939, the Trustees of the Erie made arrangements, afterwards incorporated in a written agreement dated July 10, 1939, to have the plant operated by the Pennsylvania Coal Company on behalf and at the expense of Erie, as a public service facility for the benefit of shippers of coal from the mines in Pennsylvania to the Port of New York area, for storage-in-transit under railroad tariffs.

Q. Do you know the reason why that was done?

A. It was done to provide storage-in-transit facilities for shippers over Erie and participating lines to avoid the diversion of coal shipments to competing railroad lines which provided such facilities to their shippers.

[fol. 211] Q. Is storage-in-transit an established transportation facility generally provided by coal-carrying railroads for the benefit of shippers?

A. Yes, storage-in-transit is a long established transportation facility, not only for coal, but also for many other commodities, within the definition of "Transportation" included in the Act to Regulate Commerce, and it

is covered by railroad tariffs on file with the Interstate Commerce Commission.

Q. Can you identify the tariffs applicable to storage-in-transit at Coalberg? I show you Exhibit P-12, with N. W. B. initials, introduced in evidence at the previous taking of this testimony, and ask you if the rules and regulations and conditions affecting this storage-in-transit at Coalberg are stated in that tariff?

A. They are.

Mr. Minard: I re-offer this Exhibit P-12 entitled, "Joint and Proportional Tariff, Anthracite Coal," issued in the name of Erie Railroad Company and the participating carriers stated therein, being I. C. C. Number D-1438.

(The paper referred to was received in evidence and marked Exhibit P-12.)

Q. Was that tariff filed with the Interstate Commerce Commission?

A. Yes, it was.

Q. Will you proceed and tell us about that tariff?

A. A tariff was issued January 24, 1939, effective February 25, 1939, by the Erie Railroad Company, in connection with four other railroads therein mentioned, covering interstate shipments of coal to Coalberg from stations in Pennsylvania, therein named, on the lines of the Erie Railroad Company, Lackawanna and Wyoming Valley Railroad, [fol. 212] New York, Ontario and Western Railroad and Wilkes-Barre and Eastern Railroad. That tariff was filed with the Interstate Commerce Commission as required by Federal Law, and carries the official designation of "I. C. C. No. D-1390."

That tariff remained in force until it was superseded by a joint and proportional tariff, known as I. C. C. No. D-1438, issued by the Erie on July 11, 1940, in connection with the same other railroad companies, and effective August 12, 1940, which tariff, with several supplements immaterial to the present question, except that supplement number 3 adds certain stations of origin in Pennsylvania on the Delaware & Hudson Railroad, is now in full force and effect.

Q. Can you describe briefly the tariff provisions in force since February 25, 1939, applicable to storage-in-transit at Coalberg?

A. The tariffs provide for the privilege of storage-in-transit in stock piles at Coalberg, for coal billed to the transit party for the stock pile by designation of the shipper. A charge of 14 cents per gross ton when the coal is unloaded and a like charge per gross ton when the coal is re-loaded is made to the shipper and paid by him to the railroad companies, which, together with the line-haul rate, includes the privileges of re-consignment, weighing and keeping of records of coal in and out of storage, inspection, reshipment, unloading, reloading, storage-in-transit and switching.

Q. Are the tariff provisions you have mentioned respecting the handling and storage of coal at Coalberg the same in all of the tariffs and supplements in effect since February 25, 1939?

A. Yes, with the exception that between March 18, 1942 [fol. 213] and May 15, 1943, the in-transit storage charge was 15 cents per ton in, and 15 cents per ton out of, storage.

Q. You have furnished the present tariff, that is, the tariff containing the present provisions?

A. Yes.

Q. During its operation as a public service facility, since February 25, 1939, has the Coalberg Storage plant been used for any purpose other than storage-in-transit for interstate shipments of coal under those tariffs?

A. No. It has been and is used exclusively for that purpose.

Q. Do you know whether storage-in-transit privileges are generally accorded under railroad tariffs for other commodities?

A. Yes, they are generally accorded to grain, ore, rubber, and many other commodities.

Q. Are these storage-in-transit privileges supplied as a result of traffic demands?

A. Yes.

(a) Coal is a commodity of seasonal consumption. Most of it is consumed in cold weather. If the mines could produce currently sufficient coal to meet cold weather requirements, the railroads would be swamped with coal traffic during the fall and winter months when other seasonal products are moving in large volume and weather conditions retard transportation operations. By spreading coal shipments for winter use over the months of most favor-

able operating conditions, a more uniform transportation revenue is assured.

(b) Coal dealers and consumers ship it more uniformly throughout the year by using storage-in-transit privileges under railroad tariffs, and use negotiable warehouse receipts to finance their purchases where necessary.

(c) The movement during warm weather of the bulk of the winter coal supply avoids car storage and releases [fol. 214] cars more rapidly than if they arrived frozen solid, as they often do in winter, where delayed by bad weather or had to wait unloading and use at the place of consumption.

(d) Experience has shown many instances, like those of recent occurrence, when a supply of stored coal close to the market areas has been necessary to prevent or relieve acute shortages of fuel in cases of labor, weather, or other interruptions in production or transportation.

(e) A uniform movement of coal during favorable operating conditions, avoids the congestion, delay and increased expense which otherwise attends rush and emergency transportation in winter weather.

(f) Such storage-in-transit facilitates a more uniform and steady employment, not only of the miners but also of railroad employees, as well as a more uniform and steady railroad revenue.

Q. Where does the coal mostly go when it leaves storage at Coalberg?

A. Mostly New York.

Q. Does the railroad company act entirely upon shipping instructions in connection with inbound and outbound handling and storage at Coalberg?

A. Yes. The railroad follows the billing or other instructions of the shipper or consignee.

Q. Who collects the charges for this storage-in-transit service?

A. The railroad companies collect all of the tariff charges and defray the expenses of the service.

Q. Is there any other coal storage plant on Erie lines available to shippers for storage-in-transit?

A. No. Coalberg is the only such facility on Erie lines.

[fol 215] Q. Do other competing carriers of anthracite coal provide storage-in-transit from Pennsylvania mines?

A. Yes. The New York, Ontario & Western at Middletown and Cadosia, New York; the Delaware & Hudson at Carbondale, Pennsylvania; the Lehigh Valley at Ransom and Hudsondale, Pennsylvania; the Reading at Abrams, and the Delaware, Lackawanna & Western at Wyoming, Pennsylvania.

Q. What about the Pennsylvania Railroad? You mentioned the Lehigh Valley and then you went to the Reading. What about the Pennsylvania Railroad?

A. I don't know where the Pennsylvania Railroad has their storage plant.

Q. Do they have a storage plant?

A. I believe they do.

Q. Is it a necessary element of competition for Erie to do so, this storage-in-transit?

A. Yes.

Q. Is the Coalberg transit storage plant one of the transportation facilities of the Erie that was taken over by the Federal Government under control by the President's executive order of December 27, 1943?

A. Yes, and it has since that date continued in operation under the former agreements.

Q. Does the Solid Fuels Administration have jurisdiction of this Coalberg operation?

A. No.

Q. Does the Erie maintain an agent at Coalberg?

A. Yes.

Q. That is, a freight agent?

A. Yes.

Q. Does the coal stored at Coalberg move on through billing and through joint rates from point of origin to final destination, with the privilege of stopover at Coalberg for storage-in-transit?

A. Cars are billed from mines to Coalberg for storage; charges are paid at Coalberg. When coal is re-shipped new [fol. 216] billing is issued to ultimate destination, and if any balance is due, such balance is paid by shipper at Coalberg.

Q. At the beginning of the shipment it is carried on instructions from the shipper for storage-in-transit?

A. That is right.

Q. When it moves out does it move out at the same through rate that it started with; in other words, the rate out is computed on the through rate, isn't it?

A. It is billed at total rate to the storage plant, and if it is lifted at the plant, after it has been in storage, it is reloaded and re-shipped.

Q. That is the through rate that governs the movement to ultimate destination?

A. Yes.

Q. When the coal is ordered out of storage does it move to ultimate destination as a continuance of the original interstate movement and under the original shipping contract, and the original through rates?

A. Yes. The published through rates from the mines to ultimate destination are protected.

Q. Are the tariff rates on the transportation of anthracite coal from the Pennsylvania mines to New York tidewater the same on all competing railroads?

A. Yes, except to the lower tidewater piers the rates from the mines are five cents per ton lower than to the upper piers. This five-cent differential is equalized by a higher towing charge from the lower piers.

Q. Are the tariff transit rates on coal storage the same on all those competing anthracite carrying roads?

A. Yes, they are the same as charged by the New York, Ontario & Western at Middletown and Cadosia, New York.

Q. Are the coal rates on all competing roads fixed by Interstate Commerce Commission orders?

[Vol. 217] Mr. Chandless: I object to that. I don't think the witness is competent to testify to that. That is a matter of law.

A. There have been a great many coal rate cases, where the majority of rates on anthracite have been fixed by orders from the Commission.

Q. Are the rates on the Erie included in those orders?

A. Not only on the Erie, but all railroads.

Q. Covering anthracite, and the instructions and orders cover the entire transportation of coal?

A. Yes, sir.

Mr. Minard: Cross examine.

Cross-examination.

By Mr. Chandless:

Q. You gave your opinion about the law, is that correct?

A. About the what?

Q. About the law in respect to shipments of coal, and so on?

A. The law?

Q. Yes; the I. C. C. regulation. That is a matter of law, isn't it?

Mr. Minard: The tariff.

A. The tariff? I can only testify to the tariff regulations.

Q. Was that something that you had written on the paper, that you just read from? Is that written on the paper? Your answers to the questions in this matter, you read from a paper, is that right?

A. That is right, excepting next to the last question and the answer.

Q. That is the only question that is not on the paper?

A. That is right.

Q. In other words, these questions and answers had all been prepared for you today, and you read them?

A. No.

[fol. 218] Q. Then what is the situation? Did you prepare these question-?

A. The questions were submitted to me for answers.

Q. In other words, you and Mr. Minard went over this matter, and he gave you this paper, and you are now testifying from it, is that corerct?

Mr. Bain: The witness answered the question before.

Mr. Chandless: He can tell us. He knows.

Mr. Bain: You are simply repeating the same question with the hope that you would get a different answer.

Mr. Chandless: It is a little bit too much, to say the least. Here is a man who is coal agent of a great railroad like the Erie, and he comes in and testifies from a piece of paper. None of my witnesses testified from a piece of paper.

Mr. Bain: He didn't testify from a piece of paper at all. He simply had his answers written out to a number of questions that he was going to be asked.

Q. Where did you get the paper from?

Mr. Bain: Where did he get the questions from, not the paper.

Q. The paper that you have in your hand?

A. From this office, I would say.

Q. You read your answers into the record, is that right?
A. Right.

Mr. Chandless: I move that they be stricken out as not properly taken.

Mr. Minard: You prepared the answers to the interrogatories submitted by me?

The Witness: I did.

[fol. 219] Mr. Minard: You are testifying according to the answers that you prepared?

The Witness: I am.

Q. You know, in your position as Coal Agent of the Erie Railroad, that rebates are illegal, don't you?
A. I don't know anything about rebates.
Q. You know that you cannot give one shipper a preference over another shipper? Can you?

Mr. Bain: Are you asking him for an answer of law? You objected to that a few minutes ago. Now you are asking him to testify as a legal expert.

Mr. Minard: Let me call your attention to the fact that the law does not forbid preference or rebates. It only forbids unlawful application.

Q. Will you answer the question, please? Is that your answer? Is Mr. Minard's answer your answer?
A. You are asking me a question that I have not testified to, aren't you?

Mr. Chandless: Would you read the question?

Q. (The last question was read by the reporter.)
A. I didn't testify to any preference or rebate. You are questioning me on preference and rebates.
Q. You testified that there was an agreement whereby the Erie Railroad would pay the bills for this storage plant, didn't you?

Mr. Minard: He didn't testify to that.

[fol. 220] Q. Didn't you testify about an agreement being made by the Trustees of the Erie Railroad, in your testimony, whereby this plant was to be operated for storage-in-transit, I think you called it? Didn't you give us it, that agreement, in your testimony?
A. Yes, I answered that.

Q. Doesn't that agreement provide that the Erie Railroad would pay whatever losses were sustained at Coalberg?

Mr. Bain: The agreement speaks for itself.

Mr. Minard: Do you want him to read the agreement and answer your question?

Mr. Chandless: I want to find out about how much he knows of what is going on. Here is a witness who is the Coal Agent of the Erie Railroad. He tells us about an agreement between the Erie Railroad and the Pennsylvania Coal Company.

Mr. Minard: Wouldn't you rather tell the Court that instead of to us? We know all about it.

Mr. Chandless: I want to find out. Why don't you ask the questions, then? He said he never heard of such an agreement.

Q. Do you recall the agreement that you testified about?

A. I testified to the agreement between the Erie Railroad and the Pennsylvania Coal Company to operate this plant.

Q. Doesn't that agreement provide that whatever losses are sustained there shall be paid by the Erie Railroad?

Mr. Bain: I object to that on the ground that the agreement speaks for itself. This witness could not change it in any way by anything he said.

[fol. 221] A. The agreement speaks for itself.

Q. Do you know what the loss was last year at that plant?

A. I do not.

Q. About $30,000, wasn't it, that the Erie Railroad paid?

A. I wouldn't know.

Q. You would not know?

A. No.

Q. I think you said that you were the Coal Agent there for some twelve years, is that right?

A. I was familiar with that plant, with the work of the plant, for twelve years.

Q. And during that entire twelve years, aside from the change in the billing of the coal, there was no change in the method of operation, was there?

A. I would not be familiar with the operation of the plant, that is, any changes that might have been made.

Q. What was the system used before 1939?

Mr. Minard: Doing what? Hoisting of the coal out of the cars or something?

Mr. Chandless: Yes. Let us start that way.

Q. Did they hoist it out of the cars the same way as they did before?

A. We never did hoist the coal out of the cars.

Q. How is it done now?

A. We open the hoppers and it drops into a pit, conveyed to belt conveyors and into the trimmers.

Q. That is the same today as it was?

A. To my recollection it is.

Q. Do you know of any other change since 1939 over the method used before 1939?

Mr. Bain: Do you mean as to the physical handling of the coal?

Mr. Chandless: I mean in any respect.

Mr. Bain: You are including the method of storage and all the rest of it?

[fol. 222] Q. Do you know of any change?

A. I am only a railroad man. I don't operate the plant. I am not there every day.

Q. You read a long dissertation on how the plant operated.

A. No, I didn't.

Q. Do you know what you actually read from the paper?

A. Certainly.

Q. Didn't you tell us that the bill of lading came through, and so on? You told us all about that.

A. The bill of lading is not mentioned once in this testimony.

Mr. Minard: They are not shipped on bills of lading at all. Coal is not shipped on bills of lading.

Q. Tell us how the coal comes from the mine to Saddle River Township.

A. It is billed by the shipper on waybills and shipped to the name of the consignee.

Q. What destination?

A. Rochelle Park, Coalberg, New Jersey, for storage; billed at the regular tariff rates from the mine to the storage plant.

Q. How was it billed before 1939?

A. The same way.

Q. How long did it used to remain at Saddle River Township before it was taken out?

Mr. Bain: Are you speaking of prior to 1939, when the plant was leased to Pattison and Bowns?

Mr. Chandless: Yes.

A. I wouldn't know.

Q. How long does it remain there now?

A. The tariff has a two-year limit.

Q. In other words, it comes in and it is held there awaiting orders from the consignee as to what is to happen to [fol. 223] it, is that right?

A. That is right.

Q. And it may remain there for a period of two years?

A. That is right.

Q. Then it may be re-shipped at the old rate, is that right?

A. No. After the two years cease it is re-shipped at a new rate.

Q. At any time up to two years it may be re-shipped at the old rate?

A. At the through rate from the mine at the time of the original shipment.

Q. At the time of the original shipment no one knows the final destination of that coal? It is merely delivered to Saddle River Township as a destination, is that right?

A. Well, that depends, speaking of the present time.

Q. In other words, ten carloads of coal leave the mine and go to Saddle River Township. They are put in big heaps. Come and get it. No one knows where that coal is finally going to end up, do they?

A. Today they do.

Q. Do you mean because of the scarcity of coal, and the fact that it does not remain there long at the present moment?

A. That is right.

Q. But in normal times, that coal would come in in the seasons when the demand is less than the supply, and lay there until the buyer calls for it, is that right?

A. Yes.

Q. It is built up in the late spring when the demand falls off?

A. Yes.

Q. There isn't so much demand then?

A. Yes, that is right.

Q. During the summer months it falls off?

A. Yes.

Q. I think you spoke of shipping during that time due to the fact that it does not freeze, and that is a good shipping time, the late spring and the summer?

A. Right, for storage.

[fol. 224] Q. Then it comes in and lays there until an order is sent through by the consignee as to what is to happen to the coal, is that right? Is that the normal, usual arrangement?

A. Yes.

Q. While it is there the coal is washed, is that right?

A. No.

Q. You don't know, or would you say it is not washed?

A. It is not washed while it is there.

Q. It is just put in the piles and then taken out of the piles again when the order comes through?

A. That is right.

Q. I think you said that was for the purpose of keeping the stock on hand to meet the demands of the customers, the consignees?

A. I didn't so testify.

Q. What is the reason for that storage? Why is it stored there? Why do they store it there?

A. Well, you answered it when you put the question yourself; because of the seasonal conditions the supply exceeds the demand, and, therefore, the operators bill it to storage, to store it at an advantageous point for reshipment. It also relieves the car situation. It also helps the operator to continue operating.

Q. In what way?

A. If they have too much coal in cars on tracks at the mines they cannot get any other cars to fill. They cannot get their empties. They have no place to put them.

Q. The reason for that is because the shipper at that time is not able to determine the final destination of the coal?

A. I wouldn't put it just that way. I would say that the shipper hasn't enough orders to ship it out direct to destination.

Q. The orders have not come through yet?

A. No.

Q. This 14 cents charge has no relationship to the period [fol. 225] of time that the coal may remain there? It is still a 14 cent charge whether it stays there a month or whether it stays there two years, is that right?

A. That is right.

Q. And that is the cost of unloading the coal, isn't it?

Mr. Minard: I object to that question. He testified differently.

A. No.

Q. Have you any figures which would demonstrate that it pays the storage?

A. No, I haven't.

Q. You would not say the figures indicate it does not pay for the storage?

A. The tariff tells you just what it pays for.

Mr. Minard: Just exactly what it pays for.

The Witness: I testified to that.

Q. Don't you know that the figures put in evidence by your company, the Erie Railroad Company, show that this 14 cent charge only pays for unloading?

Mr. Minard: The Erie has not put any figures in. How can he answer that question?

Mr. Bain: There are no figures that show any such thing put in here.

A. I haven't seen them.

Q. After 14 cents a ton was charged, wasn't there a loss last year of about $30,000?

A. I don't know.

Q. So you don't know whether it pays for storage?

A. I haven't seen a statement of the figures.

Mr. Minard: Read Rule 3 to him, and then he will know. [fol. 226] Do you want him to read it or don't you? That tells you exactly what the 14 cents is.

Q. Who prepared that tariff?

A. Our Tariff Bureau.

Q. In other words, that is a statement prepared by the Erie Railroad?

Mr. Minard: And filed with the Interstate Commerce Commission, according to law. Rule 3 tells you what it pays for. If you want to know he will tell you.

Mr. Chandless: We won't argue about what that is.

Mr. Minard: It is in evidence.

Mr. Bain: Don't argue with the witness.

Mr. Chandless: I am asking him what he knows about the coal business. He is the Coal Agent.

By Mr. Chandless:

Q. You are the Coal Agent of the Erie Railroad?

A. Yes.

Q. Are you head of the department?

A. I am head of the department in New York.

Q. And this yard comes under your supervision?

A. Yes.

Q. No coal goes into this yard unless you say it goes in there?

A. Yes, that is right.

Q. They have to have your approval?

A. Yes.

Q. Was this tariff prepared after consultation with you?

A. Well, yes, I was in the discussion when the tariff was being filed.

Q. Yet you prepared and filed a tariff with the Interstate Commerce Commission, and you don't know the price therein shown paid for the storage or not?

[fol. 227] Mr. Minard: Read Rule 3 and you will have it all.

Q. You don't know whether that 14 cents pays the cost of operating that storage yard or not, do you?

A. I don't know.

Q. Isn't that within the province of your duties, to determine whether or not this plan which you recommend is financially workable?

A. These charges were figured out long before I was in existence, I imagine.

Q. This is the same charge that existed there way back before you were in existence, which was twelve years ago?

Mr. Minard: Wait a minute. There was no coal tariff on Coalbeing then. It might have applied to someone else.

Q. In other words, this 14 cents a ton charge is something that was figured out long before your time?

A. Well, I just made that crack. I didn't figure out this charge by any means.

Q. That is something that came to you, before your day, is that right?

A. Yes.

Q. And it existed back—you were in charge of this matter since 1932? Right?

A. Yes, around there.

Q. That was a charge which was in existence in 1932?

A. That is right.

Mr. Minard: You testified that it has been changed in the meantime?

The Witness: Yes, that has been changed.

Q. The change that your attention has been called to by your able counsel, that is the result of this new method?

A. No. It was a general increase in rates.

[fol. 228] Q. A general increase in rates?

A. Yes.

Q. It had no bearing and nothing to do with the operation of this storage plant?

A. No; a general increase in rates.

Q. In other words, it was not intended to reflect any cost of operation of storage? It was an increase in rates that was general all along the line?

A. That is right.

Mr. Minard: Ordered by whom?

The Witness: Well, it was the Commission.

Q. It was asked for by the Erie Railroad?

A. No, it wasn't asked for by the Erie Railroad.

Mr. Minard: The I. C. C. issued the order covering that increase and they later issued another order cancelling the increase?

The Witness: That is right.

Q. By a general increase, you mean an increase on——

A. Rates and accessorial charges.

Q. There was nothing special so far as Coalberg went?

A. No. They came into the category of accessorial charges.

Q. You, of course, never prepared any figures as to the cost of warehousing?

A. No.

Q. What is the charge for unloading at other points?

A. Do you mean at other storage unloading points?
Q. Yes.

Mr. Minard: Do you mean the cost of unloading alone?
Mr. Bain: Do you mean the tariff charge similar to this one?

Q. You told us that there was an accessorial charge approved by the Interstate Commerce Commission. Is that [fol. 229] a general charge for unloading coal?
A. Our charge is the same as the charge covered in the New York, Ontario & Western tariff, applying at Middletown and Cadosia, 14 cents in and 14 cents out, including the rules and regulations published in our tariff. In fact, they are word for word.
Q. And those are the only places where coal is unloaded in this kind of business, that you know of?

Mr. Minard: He testified to other places on other railroads.

Q. Are you familiar with the rates at other places?
A. No, I am not.
Q. The only one that you know is the Ontario & Western charge?
A. That is right.
Q. Who owns that yard up there? The Ontario & Western?
A. To my knowledge it is the New York, Ontario & Western Railroad.
Q. They own it themselves?
A. Yes.

Mr. Minard: You don't know whether they own it or whether a subsidiary owns it?
The Witness: I don't know whether there is any subsidiary connection there at all. I was always under the impression it was owned by the New York, Ontario & Western Railroad.

Q. You don't know of the so-called warehousing arrangement up there?
A. No, I don't.

Mr. Minard: What do you mean, "so-called warehousing"? The rates?

Mr. Chandless: Where you rent to some warehouse company for a dollar a year.

Mr. Bain: You mean some warehouse company that might issue negotiable receipts.

Q. So far as you know the yard that you have just mentioned is owned by the Ontario & Western, and there is no dollar a year lease to any concern for the purpose of making a warehouse?

A. I don't know that.

Mr. Chandless: That is all.

THOMAS J. SNYDER, produced as a witness on behalf of the prosecutors, being duly sworn according to law by the examiner, testified as follows:

Direct-examination.

By Mr. Minard:

Q. Are you employed at the Coalberg plant?

A. Yes, sir.

Q. You act as Erie Agent up there?

A. Yes, sir.

Q. And before your time your father was the Erie Freight Agent at Coalberg?

A. Yes, sir.

Q. For how long?

A. Well, the Erie never had a Freight Agent there before this tariff went into effect.

Q. But since the tariff went into effect, in 1939, your father was the Erie Freight Agent there, and you have succeeded him?

A. That is right.

Q. Is the Coalberg plant the only plant or only yard in Saddle River Township subject to this ordinance?

A. Yes, sir.

Q. Are the tracks at the Coalberg plant used by the N. Y. S. & W. for assembly and classification of war materials, tank cars, and so forth, for switching to the water [fol. 231] front for overseas shipments?

A. That is right.

Q. How long have they been using that for a classification yard, for switching to waterfront terminals by their own freight?

A. The Susquehanna has always been receiving their cars from the Erie, and they assemble them and take them to Edgewater.

Q. That is part of the through movement?

A. That is right.

Q. They connect at Passaic Junction with the Erie-Bergen County?

A. That is right.

Q. And carry the freight on?

A. That is right.

Q. They use this as their classification yard for that purpose?

A. That is right.

Q. To what extent do they use those tracks at different times?

A. Well, sometimes we don't have any cars on them and they have them loaded with cars.

Q. All that track area?

A. That is right.

Q. They have that privilege under that agreement, Exhibit P-9?

A. That is right.

Q. So that their use covers, from time to time, all of the tracks in that property?

A. Absolutely.

Q. And that includes all of the tracks available for reaching your coal piles?

A. That is right.

Q. When cars arrive—we will say they arrive over the Bergen County at Passaic Junction—does the N. Y. S. & W. switch engine pick them up and move them into the classification yard and also to your conveyors?

A. Yes.

Q. So the N. Y. S. & W. performs all the switching service in that plant?

A. Yes.

Q. That coal, then, when it reaches Passaic Junction, is in the custody of the N. Y. S. & W.?

A. That is right.

Q. From there on until they deliver to us it is in the custody of the N. Y. S. & W.?

A. Yes.

[fol. 232] Q. When the coal goes out it goes out by N. Y. S. & W., at least, for switching purposes?

A. That is right.

Q. They deliver to whatever the delivering carrier may be, if they are not delivering, is that right?

A. That is right.

Mr. Minard: Cross examine.

Cross-examination.

By Mr. Chandless:

Q. Mr. Snyder, how long have you been up at Coalberg?

A. Nineteen years.

Q. Who did you work for during that period of time?

A. I worked for Pattison & Bowns up until the end of February, 1939, and since then I have been employed by the Pennsylvania Coal Company.

Q. And you have testified that you are the Freight Agent for the Erie?

A. That is one of the jobs, collecting freight charges for the unloading and re-loading fees provided by the tariffs.

Mr. Minard: Do you collect all the storage fees?

The Witness: Yes.

Mr. Minard: As the cars come in?

The Witness: As the coal is unloaded.

Q. You bill them? They don't come in and pay cash?

A. We bill them.

Q. Does the money come to you?

A. It comes to the Erie Railroad. We remit to the Erie Railroad. We remit to the treasurer of the Erie Railroad.

Q. You say that the money comes to the Erie?

A. That is right. As agent, the money comes to Coalberg.

[fol. 233] Mr. Minard: At your office?

The Witness: At my office, and we make remittances to the treasurer of the Erie Railroad.

Q. Sent directly through to the Erie?

A. Yes.

Q. What is the method used in so far as the loading and unloading charge prior to 1939? How was that paid?

A. There was no charge in effect, so, naturally, there was no unloading charge. It was a privately operated plant.

Q. In other words, during part of that time the yard was operated by one concern and then by another concern? How did they operate that?

A. From 1925 to the end of February, 1939, that plant was operated by Pattison & Bowns, and we were on their payroll and they paid all their expenses for us.

Q. Wasn't The Pittston Coal Company in there for awhile?

A. They might have owned Pattison & Bowns, but they didn't have anything to do with us. We were employed by Pattison & Bowns and they were our bosses.

Q. They paid the taxes there for a number of years?

A. I don't know what they paid in taxes.

Q. Now, as a matter of fact, Mr. Snyder, the area that is necessary for the storage of coal consists of the ten circles appearing on the floor plan lettered "Floor A, B, C, D, E," and also the two dotted circles which appear just above "Floor B and C" on Exhibit P-1? Is that correct?

A. The circles that you just mentioned are the areas upon which coal may be stored.

Q. Have you ever stored coal anywheres else?

A. No, but we have other facilities there outside of those areas that we have to have in order to operate.

[fol. 234] Q. What are they?

A. We have engine houses.

Q. The engine houses that you refer to are these little squares which appear just below the floor plan, and between the floor plan and the tracks, isn't that correct?

A. That is right. We have power lines running on coal company property.

Q. How many power lines have you got?

A. Well, in the way of feet there would probably be——

Q. How many lines? More than one line run-ing in there?

A. In a layout like that you couldn't serve that plant with just one straight line.

Q. One line running into the yard?

A. Yes.

Q. And it is then distributed between the various engine——

Mr. Bain: Feeder lines and transverse lines scattered all over the lot, isn't that right?

The Witness: That is right.

Q. How many sets of poles have you got, roughly, at the plant? You know what I mean.

A. There is forty-two poles of our own, not counting Public Service feeders.

Q. They are all in one stretch, aren't they?

A. No. Wherever there is any machinery there has to be an electric line going through.

Q. Where does the power come from?

A. Public Service.

Q. How does it come into the property; from what direction?

A. It comes in through Garden Street.

Q. They have one line running down Garden Street?

A. Yes.

[fol. 235] Q. It runs into that yard, that one line?

A. Yes.

Q. And from there it is split or divided up between the various machineries, is that right?

A. That is right.

Q. What else have you got up there?

A. We have equipment for pulling the cars, moving the cars to spot them under the loading chutes; take empties away and bring loads down.

Q. What kind of equipment is that?

A. They are long cables, endless cables.

Q. That is the same kind of cables used at all sidings, is that right?

A. No. I think it is the only one in New Jersey.

Q. Is that so?

A. Yes.

Q. Even on these tracks which you say the N. Y. S. & W. use?

A. The cables run between the tracks.

Q. You testified previously in these proceedings, didn't you?

A. What do you mean, "in these proceedings"?

Q. You testified before Mr. Bindseil, didn't you?

A. Oh, yes.

Q. Do you recall your testimony at that time?

A. I don't recall everything I said, no, sir.

Q. You told us that there were fourteen piles in this yard, at capacity, is that right?

A. I said there were fourteen. I probably said there were fourteen areas upon which coal could be stored.

Q. It had that capacity, fourteen areas?

A. Yes.

Mr. Minard: He didn't say anything about capacity.

Mr. Chandless: I used the word "capacity" when I talked of piles.

[fol. 236] Q. If this yard was loaded to capacity there would be fourteen piles? Right?

A. Yes, if it were loaded to capacity.

Q. Ten in the round circles and four on the dotted circles?

Mr. Minard: Two on the dotted circles.

Mr. Chandless: He previously testified that there were four in those dotted circles, and I think there are. There is one on each side of the track, on each dotted circle.

Mr. Bain: Four half circles.

Mr. Minard: The track is on an elevation above this whole area?

The Witness: No, sir.

Mr. Minard: That is not on an elevation?

The Witness: No. The track runs between.

Mr. Minard: It cuts the circles in two?

The Witness: Yes.

Q. You have testified that the total capacity to which all these piles were put is 25,000 tons?

A. That is right.

Q. You also testified that when the coal came in it was washed?

A. No, sir.

Q. Did you testify about water being used there to wash this coal?

A. Not when it came in.

Q. When is it washed?

A. A great proportion of it is never washed.

Q. There is a process of washing it when it goes out?

A. It is a freshening process. They use water to freshen the coal.

Q. You were kind of quibbling with me in the use of the words "in" and "out."

A. When? Just now?

Q. In other words, there is a washing process?

A. You said it was washed when it came in, and I didn't agree with you.

[fol. 237] Q. I was wrong. It is before it goes out. When the coal is ready to go it is freshened up?

A. Not all the coal.

Q. Why do you wash some and not others?

A. Some sizes need to be washed to be saleable on the market.

Q. What sizes are they?

A. From buckwheat and larger they have to be washed.

Q. Buckwheat; that is one of the smaller?

A. No; rice and barley don't have to be washed. That is smaller than buckwheat.

Q. From buckwheat up it has to be washed?

A. Yes.

Q. You also testified that 1941, 1942 and 1943 were not normal years, didn't you?

A. I don't recall.

Q. They were not normal years, were they?

A. Normal in comparison to what?

Q. Normal to previous years so far as demand equalling supply?

Mr. Bain: At the storage plant, you mean?

A. I have nothing to do with the demand equaling the supply. All I have to do is handle the coal when it comes in, loading it again when it goes out.

Q. You know that there is a big shortage of coal at the present time, don't you?

A. I read about it in the papers.

Q. You know that during those three years the amount of coal in there was entirely different than what it was in former years, don't you?

A. We have had less coal in storage the last three years than we have had in previous years, yes.

[fol. 238] Q. Don't you know that the coal dealers could do a whole lot more business if you could get the coal?

A. Are you asking me to guess?

Q. No, of your own knowledge of the business.

A. My knowledge of the business is what I read in the papers, just like the average John Doe.

Q. You don't know that there is any coal shortage?

A. Yes. I read it in the papers that there is a coal shortage.

Q. You don't know anything about that up at Coalberg?

A. About the coal shortage?

Q. Yes.

A. There is a shortage of coal at Coalberg. We don't have the piles we used to have.

Q. You don't know why that is?

A. No, sir.

Q. It may or may not be on account of the war?

A. I wouldn't know.

Mr. Chandless: That is all.

Redirect-examination.

By Mr. Minard:

Q. Mr. Snyder, is any part of the machinery or water tank or pump house, and so on, that is used at the Coalberg plant in connection with the storage business, used also by the N. Y. S. & W.?

A. That is right.

Q. Do you water their engines there?

A. We supply the water for their locomotives.

Q. Do you render any other service to the New York, Susquehanna & Western for their equipment?

A. Not as far as their equipment goes.

Q. Who handles the switches around the plant?

A. With respect to what?

Q. Well, the switching inside the plant.

A. There are no switches to be thrown inside. They are all practically straight tracks.

Q. And the same facilities that you use in the storage business, or a part of them, are also used for New York, [fol. 239] Susquehanna & Western regular railroad operations?

A. That is right.

Mr. Minard: That is all.

I want to re-offer Exhibit P-13, so marked by Mr. Bindseil, Township ordinance, with a mark on it indicating it

was introduced on March 9, 1934 and passed March 23, 1934. It is marked Exhibit P-13, and I re-offer that exhibit.

I also re-offer Exhibit P-14, so marked by Mr. Bindseil. It has a date, appearing that it was introduced on December 13, 1940 and passed on December 27, 1940.

(The papers referred to were received in evidence and marked Exhibits P-13 and P-14, respectively.)

Mr. Minard: Also, I re-introduce Exhibit P-16, so marked by Mr. Bindseil, which is a statement signed by the Pennsylvania Coal Company and Independent Warehouses, Inc., by Collins & Corbin, attorneys, and dated January 23, 1943.

Mr. Bain: That is the objection, the objections to the ordinance.

Mr. Chandless: These exhibits are all the same as they were before?

Mr. Bain: All the same, yes.

(The paper referred to was received in evidence and marked Exhibit P-16.)

[fol. 240] JOHN T. MCCORMACK, called as a witness on behalf of the prosecutors, being duly sworn according to law by the Examiner, testified as follows:

Mr. Minard: Mr. Chandless asked me if all the exhibits previously offered are now in. They are all in, except Exhibit P-15, which is withdrawn.

Direct-examination.

By Mr. Bain:

Q. Are you the president of the Independent Warehouses, Inc.?

A. Yes.

Q. One of the prosecutors in this case?

A. I am.

Q. How long have you been president of that company?

A. About two and a half years.

Q. And prior to that time were you one of its officers?

A. I was.

Q. What was your former position?

A. Vice-president.

Q. For how long a period of time have you been continously connected with that company?

A. About twenty-four years.

Q. Where was the Independent Warehouses, Inc. incorporated?

A. New York.

Q. What is its business?

A. Warehouse business, engaged in the business of storing merchandise for hire.

Q. In what States does the company operate?

A. Maine, Vermont, Massachusetts, Connecticut, New York, Pennsylvania, Virginia, North Carolina and Wisconsin.

Q. Is your company authorized to do business in New Jersey?

A. It is.

Q. And has it been for the last four or five years?

A. Yes, sir.

Q. Prior to that time had it been authorized to do business in this State?

A. Yes, sir.

[fol. 241] Q. For how long past was it authorized to do business in New Jersey?

A. At least twelve years.

Q. Does your company carry on the business of storing coal for hire at the coal storage plant of the Pennsylvania Coal Company in Saddle River Township, in this State?

A. Yes, sir.

Q. When did your company first begin to carry on that coal storage business at that place?

A. June 20, 1939.

Q. Did the Pennsylvania Coal Company lease the coal storage plant to your company?

A. Yes, sir.

Q. I show you a copy of a lease dated June 20, 1939, made by Pennsylvania Coal Company to Independent Warehouses, Inc., marked Exhibit P-5 in these cases, and ask you whether that is the lease under which your company operates the coal storage plant?

A. Yes, sir.

Q. Now, at the time that the lease was made, did your company enter into an agreement with the Pennsylvania Coal Company?

A. Yes, sir.

Q. I show you an agreement dated June 20, 1939, between the Pennsylvania Coal Company and Independent Warehouses, Inc., marked Exhibit P-6 in these cases, and ask you whether that is the agreement referred to?

A. Yes, sir.

Q. Was that agreement supplemented by another agreement dated May 24, 1940?

A. That is right.

Q. And I show you an agreement between the Pennsylvania Coal Company and the Independent Warehouses, Inc. dated May 24, 1940, and ask you whether that is the supplemental agreement?

A. Yes, sir.

Q. What services does the Independent Warehouses, Inc. render at the coal storage plant?

[fol. 242] A. The coal is billed to the shipper or owner for storage-in-transit at Coalberg, according to the designations of the shippers on the shipping orders at the time of the shipment from Pennsylvania. The coal is turned over to us by the railroad and we receipt for it and take it into our custody and control as public warehousemen, and hold it as such until it is ordered out by the owner.

Q. How is the Independent Warehouses, Inc. paid for its service as warehousemen?

A. Certain rates are prescribed and collected from the shippers by the railroad companies under their published and filed tariffs. Out of that we get paid for our warehouse services.

We collect and keep all fees received from the issuance of warehouse receipts, at the rate of two cents per ton, from June 20, 1939 until May 24, 1940, and thereafter at the rate of half a cent a ton. We were guaranteed a minimum revenue of $600 between those dates, and after May 24th $500.

Q. After May 24, 1940 you were guaranteed an annual return of $500 as a commercial warehouseman?

A. As a commercial warehouseman we were guaranteed an annual return of $500.

Q. Why was the guarantee limit reduced on May 24 1940?

A. Well, the competition and the ground storage business was such that we were in danger of losing the business at

Coalberg to a competitor, and we agreed to this reduction to meet that competition, to retain that ground railroad business.

Q. What are the competitive conditions involved in the business, that you have mentioned?

A. There were many public warehousemen engaged in this character of storage business, and they are all seeking it.

[fol. 243] Q. Who has the possession of the coal at the coal storage plant after it is placed in storage?

A. We have.

Q. Exclusive possession?

A. Exclusive possession, yes, sir.

Q. And also the custody and control of the coal while it is in storage?

A. Yes, sir.

Q. All as public warehousemen?

A. Yes, sir.

Q. You issue warehouse receipts for the coal, whenever they are requested?

A. That is right.

Q. During the operation of the coal storage plant by your company, has it handled any coal other than that transported by railroads in interstate commerce, from mines in Pennsylvania, under railroad tariff storage-in-transit privileges?

A. No, sir.

Q. Who owns the coal stored in the coal storage plant?

A. It is all owned by the various shippers indicated on the railroad bill of lading or the warehouse receipts.

Q. Has that been so ever since Independent Warehouses, Inc. began to operate the storage plant?

A. Yes, sir.

Q. You mean waybills, not bills of lading. The coal comes in on waybills?

A. Yes, waybills.

Q. Did the Pennsylvania Coal Company own that coal stored at the coal storage plant in Saddle River?

A. No, sir.

Q. Does it today own any coal stored there?

A. No, sir.

Q. How is the coal placed in storage? Does it come into the coal storage plant on railroad cars?

A. Yes, sir.

Q. Then is it unloaded from the cars to the storage pile?

A. Yes, sir.

Q. And kept in storage until it is ordered out?

A. Yes.

[fol. 244] Q. And who orders it out?

A. The owner.

Q. And when the coal is ordered out of storage, is it again placed in railroad cars?

A. It is re-loaded into railroad cars and continued on the railroad bill of lading.

Q. That is all done under the railroad tariff, isn't it?

A. Yes, sir.

Q. Is any of the coal delivered out of storage except by re-loading in railroad cars?

A. No, sir.

Q. And without being re-shipped or re-consigned by the railroad company on shippers' or owners' instructions?

A. No, sir.

Q. Who collects the storage charges from the shippers or owners of the coal?

A. The railroad collects all the railroad's charges; all we collect is the contract rate per ton on coal, for which we issue warehouse receipts.

Q. And they guarantee a minimum?

A. Yes.

Q. What was the amount of the gross income received by Independent Warehouses, Inc. for warehousemen's services at the Coalberg Storage plant in the last five years?

A. From June, 1939 until May, 1940, $937.27; from June, 1940 to May, 1941, $500; from June, 1941 to May, 1942, $500; from June, 1942 to May, 1943, $500; from June, 1943 to May, 1944, $500.

Q. So that, with the exception of the year from June, 1939 to May, 1940; your company received the minimum compensation to be paid under your agreement with the Pennsylvania Coal Company?

A. That is right.

Q. The ordinance of the Township of Saddle River involved in this case provides for an annual license fee to be computed on the basis or rate of three-quarters of a cent for each square foot of the total ground area of the place [fol. 245] and premises in the Township of Saddle River at which said business is conducted or carried on, that is, the

business of storing personal property in a warehouse engaged in the storing of goods for hire?

A. Yes

Q. Would it be possible for your company to carry on its business of storing coal in Saddle River Township and pay a license fee as required by that ordinance?

A. No, sir.

Q. Why not?

A. The fee is prohibitive.

Q. Mr. McCormack, your company did not apply for a license to do business, as required by the licensing ordinance of the Township of Saddle River, did they?

A. No, sir.

Q. And a summons was served upon your company for an alleged violation of that ordinance, is that correct?

A. Yes, sir.

Q. Returnable before the Recorder's Court of the Township of Saddle River?

A. Yes, sir.

Q. And the complaint for violation of the ordinance alleged that the Independent Warehouses, Inc. on April 12, 1943, between the hours of eight and ten o'clock a. m., at the Township of Saddle River, on assessment map shown as Block 106-D, commonly called Coalberg, conducted or carried on the business of the storage of personal property in a warehouse engaged in the storing for hire, without their having been granted, by the Township Committee of the Township of Saddle River, a license.

Now, assuming that the place or premises at which the business alleged in the complaint to have been conducted or carried on, consisted of Block 106-D on the assessment map of Saddle River Township, and that that block contained 2,730,296 square feet, and the license fee under the ordinance based on the number of square feet would [fol. 246] be $20,475, would it be possible for your company to pay any such license fee and carry on its business as a coal storage plant?

A. No, sir.

Q. Why?

A. The fee is prohibitive.

Q. Would it be possible for your company to continue to carry on its coal storage business at the plant and pay anything other than a nominal license fee?

A. No, sir.

Q. By nominal fee I mean not over $100 or $200?

A. That is right.

Q. Could the Independent Warehouses, Inc. earn a sufficient amount from the issuance of the negotiable warehouse receipts for coal stored at this coal storage plant, to enable it to pay a substantial license fee under that ordinance, and at the same time carry on the company's business?

A. No, sir.

Q. Would it be possible for your company to increase its earnings from its business at the coal storage plant so as to enable it to pay a license fee under that licensing ordinance, and at the same time carry on its business?

A. No, sir.

Q. If your company were compelled to pay a license fee as required by the license ordinance of Saddle River Township, would it be compelled to go out of business at the plant?

A. Up there, yes, sir.

Q. Could your company increase its storage charges at the coal storage plant without the permission of the OPA?

A. No, sir.

Q. By OPA I mean the Federal Office of Price Administration.

A. That is right. You have to get permission.

Q. And the OPA regulations apply to all your competitors in the storage business, do they not?

A. Yes, sir.

[fol. 247] Q. If you were compelled to pay this license fee and could not earn enough to pay it under the OPA regulated storage regulations, you would have to go out of business?

A. At that place, yes.

Q. Is there anything pertaining to the storage of coal at the coal storage plant in Saddle River Township that threatens to affect the health, welfare, or safety of the community?

A. Not a thing. The coal is not inflammable and it is not combustible as most other property, such as wooden dwelling houses. The coal storage plant presents no menace whatever. It is no different from the coal stored in a private dwelling, say, or in a coal yard. There are no fumes, odors, and it is not in a residential section.

Q. The business carried on by your company at the coal storage plant in Saddle River Township during the last three or four years shows that the company could not earn more than the minimum guaranteed under its agreement with the Pennsylvania Coal Company, isn't that so?

A. That is right.

Q. Did you testify before the Recorder on the hearing of the complaint against you for violation of the licensing ordinance of the Township?

A. Yes, sir.

Q. Did you at that time testify that the arrangement under which the Independent Warehouses, Inc. operates the storage plant in that Township is a device to avoid the payment of any taxes?

A. No, sir.

Q. You at that time and place testified that the land on which Independent Warehouses, Inc. operates at the storage plant has an area of sixty-seven and one-quarter acres?

A. No, sir.

[fol. 248] Q. Did you then testify that Independent Warehouses, Inc. stored any coal of the Pennsylvania Coal Company at the coal storage plant?

A. No, sir.

Mr. Bain: That is all.

Cross-examination.

By Mr. Chandless:

Q. I call your attention to Exhibit P-6, and ask you who is referred to as the customer in Exhibit P-6?

Mr. Bain: I object to the question on the ground that the agreement speaks for itself, and states who the customer is.

A. Pennsylvania Coal Company.

Q. You executed that agreement, didn't you?

A. I believe I did.

Q. And in that agreement you say on Page 5 of the typewritten copy of it, "It is understood that the delivery of coal in said warehouse and the transportation of coal from said warehouse shall be performed by the customer"? What does that sentence mean?

A. The Pennsylvania Coal Company would perform that or have it performed.

Q. It means that they would deliver the coal to you and take it away, is that right?

A. Yes, sir.

Q. That refers to all of the coal in that agreement, doesn't it?

A. That is right.

Q. And the coal is the coal of the Pennsylvania Coal Company, isn't it?

A. Well, no.

Mr. Bain: That does not prove that the coal is the coal of the Pennsylavnia Coal Company.

Mr. Minard: The customer is only the one that they make the contract with.

[fol. 249] Q. I want to know what you meant when you signed the agreement.

A. We naturally signed the agreement with the Pennsylvania Coal Company.

Q. You refer to them as your customer?

A. Yes.

Q. In there you say, "It is understood that the delivery of coal in said warehouse and the transportation of coal from said warehouse shall be performed by the customer."

Mr. Bain: I object, unless the witness's attention is particularly called to the agreement between the Pennsylvania Coal Company and the Trustees of the Erie Railroad. You have to read the two agreements together in order to ascertain what the word "customer" means.

You should direct the witness's attention to that fact.

A. It means that the Pennsylvania Coal Company would perform it or have it performed.

Q. It means that the Pennsylvania Coal Company are your customers and it was their coal?

A. Not necessarily.

Mr. Bain: The word "customer" is a mere designation giving a title to the Pennsylvania Coal Company for purposes of the agreement. The "customer" ordinarily means one who purchases something.

Q. I understand that the Pennsylvania Coal Company deliver their competitors coal.

Mr. Bain: Who is their competitor?

Q. Has the Pennsylvania Coal Company got any competitors?

A. I don't know. I assume they have.

[fol. 250] Q. Do I understand that this agreement that you executed with the Pennsylvania Coal Company provided that the Pennsylvania Coal Company was to deliver competitors' coal?

A. It could be possible.

Q. What do you understand that the agreement means in that respect?

A. We surely did not mean that the coal belonged to the Pennsylvania Coal Company; not necessarily.

Q. What does it mean?

A. Only that we entered into an agreement with the Pennsylvania Coal Company.

Q. What did you mean when you used the words in that agreement, "It is understood that delivery of coal to the said warehouse shall be performed by the customer"? Did you mean by that to deliver their competitors' coal?

A. They could have it performed regardless of whose coal it was.

Q. Would they deliver their competitors' coal to you?

A. Maybe. I wouldn't know.

Q. In short, all you have to do with your coal yard is to collect $500 a year, is that right?

A. To do what?

Q. All you have to do with your coal yard is to collect $500 a year, is that right?

A. And issue warehouse receipts.

Mr. Bain: I object to any further questioning along this line unless this provision of the agreement is called to the attention of the witness. I submit it is not fair to pick out certain portions of that agreement and direct the witness's attention to them, without calling his attention also to other portions of the agreement which are necessary for him to have in mind in order to answer your questions.

[fol. 251] Mr. Chandless: I will leave it to the Court as to whether or not it is proper cross-examination. Do you maintain that the questions that I am asking him are not proper cross-examination?

Mr. Bain: Absolutely I do.

Mr. Chandless: Do you mean that this witness must be protected to that extent?

Mr. Bain: I mean that this witness is entitled to read the whole agreement before he answers any of your questions, and if you do not give him the opportunity to read the whole agreement, he has a right to have his attention called to other portions of the agreement which it is necessary for him to have in mind in order to answer your questions. That is only common fairness.

Mr. Chandless: I am trying to find out what this agreement means.

Mr. Bain: Perhaps counsel is protecting the witness against unfair questions, and he can only do it by objecting.

By Mr. Chandless:

Q. As a matter of fact, all the expenses of the operation of this agreement were to be paid by the Pennsylvania Coal Company? Is that correct?

A. Yes, sir.

Q. So that, in short, when, as appears by Exhibit P-10, there was an operating deficit at Coalberg on December 31, 1943, of $30,735.59, for the year 1943, that operating deficit was paid by the Pennsylvania Coal Company under its agreement with you, isn't that correct?

A. I don't know.

Mr. Minard: They include his figures, but they include a lot of other figures.

The Witness: I wouldn't know that.

[fol. 252] Q. All of the operating expenses at Coalberg were, under your agreement, to be paid by the Pennsylvania Coal Company, isn't that right?

A. Yes, sir.

Q. So that you collect your $500 for the use of your name?

Mr. Bain: I object to any such imputation. That is not shown by the agreement.

A. And the issuance of warehouse receipts.

Q. As a matter of fact, under Paragraph 5 of Exhibit P-6 even your attorney's fees are paid by the Pennsylvania Coal Company, aren't they?

A. They are supposed to.

Q. That is no disgrace.

A. There were no attorney's fees on there. That is a form lease.

Q. The customer, Pennsylvania Coal Company, agreed to reimburse the warehouse company for any loss caused or expenses for damages paid or incurred by the warehouse company in connection with the warehouse operations on the demised premises, isn't that right?

Mr. Minard: Read the rest of it.

Mr. Chandless: You have a right to examine him.

Mr. Minard: Why don't you read the entire paragraph? Why don't you be honest about that?

Mr. Bain: You don't understand that it is not correct to call a witness's attention to part of a written document, for the purpose of getting an answer that you want, without calling his attention to the entire document or giving him the right to read it?

Mr. Chandless: He signed this agreement.

[fol. 253] Mr. Bain: He can't carry it all in his head.

Mr. Minard: Let him read the paragraph. Give the witness a chance.

Q. Were there any expenses of operation, of any kind or character, paid by Independent Warehouses, Inc. at Coalberg?

Mr. Minard: Objected to, because the agreement expressly says that there are exceptions.

Q. Were there any paid? Did you pay any expenses of operation at all up there at Coalberg?

A. Well, we had some expense in connection with the operation, if that is what you mean.

Q. Tell us what they were.

A. Auditors, say every two months; signs that we had made.

Mr. Minard: His salary.

A. (Continuing:) Part of the auditor's salary.

Q. Those are apportioned, aside from the signs, perhaps; they are apportioned between the various warehouse operations that your company has? Your salary certainly is not paid out of Coalberg out of the $500 that you get?

A. No, sir.

Q. And the auditing expenses that you might have are not paid out of Coalberg?

A. It is possible.

Q. In other words, you get $500 a year and you pay out of accumulated receipts of a similar nature, from other warehousing arrangements, your salary is paid and the auditing expenses are paid, is that correct?

A. That is right.

Q. You put up a sign in your place?

A. Yes.

[fol. 254] Q. Mr. Thompson and Mr. Snyder get paid by the Pennsylvania Coal Comapny?

A. Mr. Thompson gets paid by us.

Q. He gets paid by you?

A. Yes.

Q. Doesn't that agreement provide that he is to be paid, and then you charge it back to the Pennsylvania Coal Company?

A. To the Pennsylvania Coal Company, yes.

Q. Will you tell us what in this agreement would make you responsible for license fees?

A. We pay license fees in some cities.

Q. Where in this agreement—a license fee would be a loss to you and an expense?

A. Yes.

Mr. Bain: That is your construction.

Mr. Chandless: I am trying to find out.

Mr. Bain: Don't ask him to legally construe this contract, please.

Mr. Chandless: If anybody can, they are good.

Q. As a matter of fact, if this license fee is held legal you are just going to pass it right along to the Pennsylvania Coal Company, and they are going to pass it along again, isn't that true?

Mr. Bain: I object on the ground that it is entirely improper. He doesn't know.

A. I don't know. That will have to be worked out.

Q. Your company never applied for a permit for the area actually used for storage purposes?

A. No, sir.

Q. Do you know what the area actually used for storage purposes is?

A. No, sir.

Q. Calling your attention to Exhibit P-1, I ask you whether it is not correct that the area actually used for

storage purposes, if, as and when the yard is at capacity, is the area embraced in the ten circles appearing on "Floors [fol. 255] A, B, C, D and E," and also the area within the dotted circles, above the circles in the floor area?

A. That is correct.

Mr. Minard: Is the answer correct? What about the tracks and power house and all the other things that you use?

The Witness: That would take it all in, naturally.

Q. You don't store coal in power houses, do you?

Mr. Minard: He conducts a business there.

Mr. Bain: There is nothing in your ordinance as to a license fee being placed on that portion of the coal storage business.

Q. Do you store coal in the power house?

A. No.

Q. You never applied for a permit for the area embraced within the so-called floors where the coal was actually stored, did you?

A. No, sir.

Q. As a matter of fact, the area of the property actually used at Coalberg for the storage of coal is about 630,000 square feet, isn't that correct?

A. I don't know.

Mr. Minard: The ordinance says, "For conducting a business."

Q. It doesn't say that it is limited to coal floors? How big are the power houses, if we include those in that area?

Mr. Minard: How about the tracks?

Mr. Chandless: We would have a fine job making you take out a permit for tracks.

Mr. Minard: You have got a fine job making us take any permit out.

[fol. 256] Q. These tracks that Mr. Minard has referred to are the tracks where the N. Y. S. & W. make up their freight trains, isn't that correct?

A. Yes.

Mr. Bain: They are also used for the purpose of placing the coal for storage?

The Witness: Yes.

Q. They are the tracks that the New York, Susquehanna & Western Railroad use to make up their freight trains, and the tracks on which this coal comes in, aren't they?

A. That is right.

Q. You don't store coal in cars for any period longer than it is necessary to get it out of the cars and into the piles, isn't that true?

A. That is right.

Q. There are no OPA regulations on storage charges, except that all storage charges are frozen? That is what you mean?

A. That is what I mean.

Mr. Minard: Is that right, Mr. McCormack?

The Witness: Yes, I say it is right.

Mr. Minard: Well, have you read the regulations?

The Witness: No, I haven't, but——

Mr. Minard: Here (handing witness papers); just look at it.

Mr. Chandless: I object to this.

Mr. Minard: That is not what the regulations say.

Mr. Chandless: You produce, Mr. Minard, what is reputedly a competent witness. You vouch for him, and now you find that he does not give the answer that you like. Therefore, you try to put words in his mouth. He should know something about the warehouse business.

[fol. 257] Mr. Minard: Why shouldn't the regulations be the best evidence?

Mr. Chandless: Your associate asked him questions.

Mr. Minard: Being an associate I have a right to object.

Mr. Chandless: You should object at that time. Don't object when I cross-examine.

By Mr. Chandless:

Q. You spoke about general welfare, as far as a coal yard of this character goes. You have heard of coal fires, haven't you?

A. Yes, sir.

Mr. Bain: In mines, yes.

Q. You have heard of coal fires in a coal yard, too, haven't you?

A. No, I haven't. I don't recall that I ever heard of any.

Q. You don't recall Burns Brothers fire down along some yards they had in the East River, New York?

Mr. Bain: That was bituminous coal.

Mr. Minard: That was a pier that got on fire, not the coal.

Q. And the coal burned for days?

A. No, I don't recall that.

Q. You say that this coal could not burn?

A. It is not inflammable.

Q. By "inflammable" you mean what?

A. To ignite. The spark could not be created.

Q. You mean that the chances of spontaneous combustion are rather remote? Is that what you mean?

A. Yes.

Q. You would not say that the coal would not burn?

A. If you put it on fire, of course, it will burn, but [fol. 258] you don't hear of a coal yard burning. I don't recall the fire that you mentioned, Burns Brothers, and I know where Burns Brothers is.

Q. Your attorneys remember it.

A. How many years ago is that? You very seldom hear of it.

Q. Well,——

Mr. Chandless: You were talking about it being bituminous coal?

Mr. Bain: If that is the one I have in mind, it was. I don't know which one you have in mind.

Mr. Chandless: I had in mind the same one that Mr. Minard referred to, where Burns Brothers pier or piers in New York got on fire.

Mr. Minard: I was mentioning that that was a pier fire and not a coal fire. It was coal that ignited from the fire on the pier.

Q. How about the danger of theft? Do people come in to steal your coal?

A. It is possible.

Mr. Bain: They keep a watchman there, though.

The Witness: Especially in these days.

Q. It is usual?

A. It is possible.

Mr. Minard: The police of Saddle River Township never did anything about it, did they?

Q. You spoke about the area where this is located. Isn't it correct that in that block there is a new housing development?

A. Yes, but I wouldn't call it a residential section, that neighborhood. A few houses.

Q. How many?

A. A few

[fol. 259] Q. There is a new housing development within a block of it, isn't there?

A. Yes, there are some houses.

Q. Doesn't your own exhibit show houses?

A. Yes.

Q. That housing development does not appear on that exhibit, does it?

A. No.

Mr. Bain: How does he know if he has not looked at it?

The Witness: I didn't take notice.

Mr. Chandless: That is all.

Direct-examination.

By Mr. Minard:

Q. With regard to this word "customer," as far as you are concerned, in making that agreement, the Pennsylvania Coal Company was your customer on your books; wasn't it?

A. That is right.

Q. Is that what that word "customer" meant?

A. That is right.

Q. And the provision that they should put the coal in and take it out, did that mean anything more than you would have no responsibility for placing the cars in or taking them out?

Mr. Chandless: I object to it as leading.

A. That is right.

Mr. Chandless: He testified before he couldn't tell what it meant.

Q. The entire agreement, Exhibit P-6, the operating agreement, constitutes your agreement with the Pennsylvania Coal Company, doesn't it?

A. Yes.

Q. And not one line or one paragraph?

A. The entire thing.

[fol. 260] Mr. Minard: That is all.

Mr. Chandless: You also have P-5.

Mr. Bain: That is the supplemental agreement that changed the rate.

Mr. Chandless: P-7 changed the rate.

By Mr. Chandless:

Q. You have another one with the Pennsylvania Coal Company where they are referred to as "lessor"?

A. We have a lease and a supplemental agreement.

Q. Why was it necessary to have the second agreement? The Pennsylvania Coal Company is referred to in one as "lessor" and in the other one they are referred to as "customer."

A. That is a legal term. One is a lease and one is the agreement.

Q. You rented this from the Pennsylvania Coal Company. Why was it necessary for you to have this agreement with them as "customer"?

A. The agreement specifies it, and you had to specify some money in it. You had to agree to certain things.

Mr. Bain: The agreement speaks for itself.

Mr. Chandless: This is cross-examination.

Q. You get your money under your lease?

A. No.

Q. You get your money under your agreement with the customer, is that correct?

A. That is right.

Q. In other words, the Pennsylvania Coal Company in one instrument leases it to you for a dollar, and in the second instrument they pay you $500 for the use of your name?

[fol. 261] Mr. Bain: I object to that on the ground that it contains an imputation that is disproved by the exhibits in the case.

A. No.

Q. What is the second agreement, the so-called customer agreement?

A. It speaks for itself, as Mr. Bain said. It outlines certain things that had to be performed.

Mr. Chandless: That is all.

JAMES THOMPSON, called as a witness on behalf of the prosecutors, being duly sworn, according to law by the Examiner, testified as follows:

Direct-examination.

By Mr. Bain:

Q. Are you employed by Independent Warehouses, Inc., one of the prosecutors in this case?

A. I am.

Q. What is your position with that company?

A. I am called the manager of the yard, of the Coalberg Storage plant.

Q. By yard, you mean the coal storage plant in Saddle River Township?

A. That is right.

Q. You are manager of that plant for the Independent Warehouses, Inc.?

A. That is right.

Q. They pay your salary, don't they?

A. They do.

Q. What are your duties at the plant?

A. To keep the records of the coal for the different consignees and notify the Independent Warehouses, Inc., of the tonnage, and give them weekly reports of the coal in storage for each account; keep a record of the warehouse receipts issued and cancelled.

[fol. 262] Q. Who issues the warehouse receipts?

A. The New York office.

Q. They come through you?

A. Yes, they come through me.

Q. You advise the New York office when you issue warehouse receipts?

A. Yes.

Q. Upon receipt of the warehouse receipts you transfer them to the owners of the coal?

A. No. They give me a letter telling me they have to issue tonnage to different concerns.

Q. The business at the coal storage plant is conducted and carried on by the Independent Warehouses, Inc., as a public warehouse, is it not?

A. That is right.

Q. You don't carry it on yourself?

A. No, sir.

Q. You are merely an employee of the company that actually conducts and carries on the business?

A. That is right.

Q. You have no other interest in the business except to manage the plant for the Independent Warehouses, Inc.?

A. That is right.

Q. You were served with a summons for violation of this ordinance, returnable before William Scheele, the Recorder of the Township of Saddle River, were you not?

A. I was.

Q. The summons was issued on a complaint that you violated the licensing ordinance of the Township because you worked in, occupied or utilized the place or premises in which then and there was conducted or carried on the storage of personal property in a warehouse engaged in the business of storing of goods for hire, without there having been granted by the Township Committee of the Township of Saddle River a license?

A. Yes.

Q. You worked on the premises, did you not?

A. I did.

[fol. 263] Q. You did not occupy it, then?

A. No, sir. I just worked there.

Q. You did not utilize them?

A. No, sir.

Q. In fact, all that you did was to work for the company that did conduct or carry on the coal storage business at the coal storage plant?

A. Yes.

Q. And you occupied or utilized it for that purpose, is that correct?

A. That is right.

Q. Did you serve on the Township Committee of the Township, in behalf of the Pennsylvania Coal Company

and Independent Warehouses, Inc., objections to the passage of the ordinance, before the ordinance was passed?

A. I did. I served it on Joseph Gardner, the Township Clerk, January 25, 1943, I believe, at six-thirty P. M.

Q. The meeting at which the ordinance was passed was not held until some time subsequent to that date?

A. That is right.

Q. I show you a copy of those objections and ask you whether those are the objections filed by you?

A. That is right.

Mr. Bain: I desire to offer these objections in evidence. These objections have been heretofore offered and marked as Exhibit P-16.

(The paper referred to was received in evidence and marked Exhibit P-16.)

Mr. Bain: That is all.

Cross-examination.

By Mr. Chandless:

Q. You testified in the tax certiorari proceedings, didn't you?

A. I believe so.

Q. You have been employed by the Independent Warehouses, Inc. for a number of years, haven't you?

A. Yes, sir.

[fol. 264] Q. How many years was that?

A. Going on fifteen, that I have been at the plant.

Q. And during that period of time you were employed by the Independent Warehouses?

A. That is right.

Q. In the same capacity in which you are now employed?

A. Yes, sir.

Q. In other words, this is a clerical duty of issuing the warehouse receipts, is that right?

A. I don't issue them. I just keep a record of the receipts that are issued.

Mr. Minard: Are you talking about since it has been a storage warehouse or talking about when it was operated by Pattison & Bowns?

Mr. Chandless: I am talking about the witness's testimony; as he previously testified and as he has testified today.

Mr. Minard: Has he previously testified? There is his testimony of the previous time (indicating). You won't find a word in there about issuing warehouse receipts.

The Witness: I said I didn't issue them.

Mr. Minard: You mean that during Pattison & Bowns' time you didn't issue them?

The Witness: I didn't issue them. I took a record of the warehouse receipts that were issued.

Q. How did you do that? By telephone or mail?

A. No; by mail.

Q. That is the same system that is used today, is that right?

A. Practically.

Q. Now, your connection with the Independent Warehouses, Inc., with Coalberg, goes back for at least fifteen years, is that right?

A. Well, in the neighborhood of that.

[fol. 265] Q. And about these agreements back and forth between the Pennsylvania Coal Company and Independent Warehouses, Inc., you know nothing about them? They did not go through your hands at all?

A. No, I didn't know anything about them.

Q. The present method is the same as the old method, as far as your duties go?

A. Yes, in so far as my duties are concerned.

Q. You got your check, then, from the Independent Warehouses, Inc.?

A. Originally I didn't. I got it from Pattison & Bowns. I was later transferred to the Independent Warehouses payroll.

Q. Do you know anything about them being reimbursed by the Pennsylvania Coal Company?

Mr. Bain: You are speaking of what time? I want you to fix the period for the purposes of your last question.

A. I have heard it through the testimony.

Q. So far as you are concerned you are just going along on the same system used in the past fifteen years?

Mr. Bain: I object on the ground that the witness has testified on that. If you recollect, he said he issued warehouse receipts for Pattison & Bowns.

Mr. Chandless: I am examining the witness.

Mr. Bain: You can't ask him on cross examination a question which is directly contrary to an answer you got on a previous examination question.

Mr. Chandless: I am entirely satisfied with all his answers. Will you read the last question?

[fol. 266] Q. (The last question was read by the reporter.)

A. As to what? The way the records are kept?

Q. Yes.

A. Except the change when the Erie took over.

Q. When the Erie took over? When was that?

A. That was when the Pennsylvania Coal Company took over the operation for the Erie.

Q. That was about when?

Mr. Minard: The contract shows that.

Mr. Chandless: If he knows.

Q. Do you know?

A. No.

Q. Four or five years ago?

A. Yes.

Mr. Bain: 1939.

Q. Then, as I understand it, the warehouse receipts were always issued in New York by Independent Warehouses, is that correct? You telephoned or wrote in there?

A. They would get weekly reports as to the coal in storage.

Mr. Minard: When you say "always," do you mean since the Erie took over?

The Witness: No; previous to that.

Mr. Minard: You mean that the Independent did that spot storage in there for Pattison & Bowns?

The Witness: Yes.

Mr. Minard: At times?

The Witness: Yes.

Mr. Minard: Not all the coal was handled?

The Witness: No.

Mr. Minard: Only special lots?
The Witness: Yes.

Q. The Independent Warehouses, Inc. was in there and you were working for them?
A. I was on their payroll.

[fol. 267] Mr. Minard: Prior to February, 1939?
Mr. Chandless: For fifteen years he was on their payroll.
The Witness: I was originally on Pattison & Bowns payroll and then I was transferred to Independent.

Q. When did you go on the Independent Warehouses payroll?
A. I don't know the date.
Q. Look at your previous testimony. Is your previous testimony correct in that respect?
A. That is right.
Q. What is your answer to the question?

Mr. Minard: What is the page, Mr. Thompson?
The Witness: Page 49.
Mr. Minard: How does it read?
The Witness: (Reading) "By whom are you employed, Mr. Thompson?" The answer is, "By the Independent Warehouses, Inc." The question is, "For how long a time have you been employed by that company?" And the answer, "I have been on their payroll since September, 1929."

Q. Is that correct?
A. Yes.
Q. Now, so far as the area up there, Mr. Thompson, that is necessary for storage, that appears on Exhibit P-1 as the circular piles, is that correct?
A. I never saw the exhibit.
Q. The area necessary for actual storage are the circles which appear on the floor plan lettered from A to E, and also the broken circle spaces above the floor plan?

Mr. Bain: The question is objected to upon the ground [fol. 268] that the licensing ordinance of the Township of Saddle River does not provide for a license fee based upon the area necessary and actually used for the maintenance of coal piles.

A. That is the floor space which coal can be stored on.

Q. That is the floor space which coal can be stored on?
A. Yes.
Q. And you do not store coal at any other place except in those areas?
A. Only where it has been provided for with machinery.
Q. That is the only area which has been provided with machinery?
A. Yes.
Q. In the area embraced in the circles that we called your attention to?
A. That is right.
Q. There is about 25,000 tons capacity in each pile?
A. When they are full.
Q. How high are the derricks?
A. Well, I would say——

Mr. Bain: Don't guess at it, if you don't know.

A. (Continuing:) I never measured that, but just from the testimony given today it is supposed to be 65 feet high.
Q. You would not say they are higher than that would you? You don't know?
A. I have been on top of them, but I don't know as they are much higher than that.

Mr. Chandless: That is all.

Redirect-examination.

By Mr. Bain:

Q. Mr. Thompson, while Pattison & Bowns were in possession of the coal storage plant at Coalberg, were you [fol. 269] there every day?
A. I don't get what you mean by that, was I there every day.
Q. Yes; every day of the week?
A. No, I wasn't there every day of the week.
Q. You didn't work there continuously?
A. Not seven days a week. There was a period when I was off for several months.
Q. What did you do at that time?
A. When I was off?
Q. No, while Pattison & Bowns were in possession and control of the coal storage plant?

A. Kept a record of their tonnages. They stowed all the coal then, at that time.

Q. The Independent Warehouses, Inc. were not storing the coal at that time, at the plant?

A. They did not store any coal.

Q. They issued warehouse receipts, did they?

A. In the name of other companies that had put coal in there.

Q. That is, when Pattison & Bowns sold their coal to other companies and the other companies who purchased the coal desired warehouse receipts, then Pattison & Bowns notified you of the sales by them and the fact that negotiable warehouse receipts were desired, and you would notify the Independent Warehouses, Inc.?

A. No. Independent would send me a letter stating they had issued warehouse receipts covering tonnages, like the Knickerbocker Ice or the New York Trust Company.

Q. That was in the nature of spot storage done by Independent for Pattison & Bowns?

A. All the coal was not out on warehouse receipts; only some tonnages.

Q. A comparatively small part?

A. That is right.

[fol. 270] Q. As to that part, Independent Warehouses, Inc. acted as field warehousemen for Pattison & Bowns?

A. I would say so.

Q. Who paid you at that time?

A. As I said before, originally Pattison & Bowns.

Q. Up to 1939?

A. No. It was previous to that. I was only on Pattison & Bowns payroll, I think, a short while.

Mr. Chandless: Then you went on the Independent Warehouses' payroll?

The Witness: Then I went on Independent Warehouses' payroll.

Q. But Independent Warehouses, Inc., while Pattison & Bowns were in possession and control of the coal storage plant, acted as warehousemen for the purpose of issuing warehouse receipts at the request of Pattison & Bowns, to customers of Pattison & Bowns?

A. That is correct.

Q. Those conditions were entirely changed from 1939,

when the Independent Warehouses, Inc. went into possession of the entire plant as commercial warehousemen?

A. As I said before, there were only a few customers that requested the warehouse receipts.

Q. While Pattison & Bowns were in possession?

A. While Pattison & Bowns were in possession, and operated the plant.

Q. But there were many customers who requested them after Independent went into possession?

A. That is right.

Q. It is incorrect to say that the business has been carried on in the last fifteen years in the same manner, in so far as the Independent Warehouses, Inc. and Pennsylvania Coal Company or anybody else is concerned?

A. That is right.

[fol: 271] Q. Mr. Chandless asked you as to the capacity of the various piles. Were they ever completely filled to full capacity?

A. The entire plant?

Q. Yes.

A. No.

Q. At any time in the last five or six years?

A. Not since I have been there; not in the last fourteen years.

Q. Can you state how much of the entire plant is used for purposes of conducting and carrying on the business of storing coal, other than the platforms on which the coal piles are placed?

A. I don't understand the question.

Mr. Bain: Will you read the question?

Q. (The last question was read by the reporter.)

A. The only part of the plant that would be suitable for storage would be these platforms. The other parts would be of no use at all for storage.

Q. The other parts are used in connection with the putting of the coal and storing of the coal on the storage platforms?

A. Yes. You would have to have your tracks reaching to the various hoppers for unloading, and towers for reloading.

Q. And various buildings are used?

A. You have a boiler house, a roundhouse, and an engine house that houses the machinery and electrical equipment.

Q. And some part of the lands around each coal pile on which the men who work on the coal piles can walk?

A. Yes. You have some up and down the track.

Q. Up and down the tracks, as well as the coal piles?

A. Yes.

Q. Do you have a water tank there?

A. Yes.

Q. That is part of the coal storage plant?

A. It is.

[fol. 272] Q. What else is part of the coal storage plant?

A. Don't know. I guess that takes it all in.

Q. In the event of an emergency, would it be possible to throw coal on the ground up there?

A. Not unless you got some emergency equipment in to handle it; a crane, and so forth.

Q. It could be done?

A. Our coal is all handled——

Q. If you had to increase the capacity of the plant there would be room for expansion, wouldn't there?

A. There would.

Mr. Bain: That is all.

Recross-examination.

By Mr. Chandless:

Q. These tracks and towers that you refer to, they are the tracks which are also used by the N. Y. S. & W. for the purpose of making up freight trains?

A. Yes.

Q. The cars come in on those tracks?

A. They also use those tracks to classify cars that come in for unloading at the plant, and other cars that come in for, say, anywheres in that locality. They drill them out and classify them and group them in different tracks.

Q. You use the tracks jointly with the New York, Susquehanna & Western Railroad?

A. That is right.

Mr. Minard: Some of them?

The Witness: Some of them.

Q. The towers that you talk about are the derricks? Is that what you mean by towers?

A. No. The towers are located over the rails. They have big gears and chains in them, to draw the coal up to the chute, to let down over the coal cars.

[fol. 273] Mr. Bain: To load cars?

The Witness: Yes.

Q. The floor area involved in each one of those towers would be about how much?

A. I don't know offhand.

Q. Twenty by twenty, ten by ten, thirty by thirty?

A. It would be a guess if I said.

Mr. Bain: Don't guess.

Q. But you know about how large an area there is?

Mr. Bain: We have the actual area testified to by the witness.

Mr. Chandless: No, not on the towers.

The Witness: I couldn't answer that very well. Mr. Snyder is more familiar with the machinery than I am.

Q. Are they twenty by twenty?

A. I couldn't tell you.

Mr. Minard: The answer is, he doesn't know.

Q. Describe one of them, so that we will know what they are.

A. A tower is a tower. That is all I can say.

By Mr. Bain:

Q. Does it stand straight up in the air?

A. It does.

Q. Is it made of metal or wood?

A. Steel beams and wood.

Q. How high is it?

A. I would say about thirty feet high.

Q. About how square is it at the base, if it is square?

A. Probably ten by ten.

[fol. 274] Q. Does it have arms that extend out?

A. It is a chute.

Q. Does that extend over the coal platform?

A. To let down over the coal cars.

Q. Not over the platform?

A. Oh, no. Directly above the track.

By Mr. Chandless:

Q. So that the chute will go down into the car?

A. That is right.

Q. How big are the engine houses that you spoke of?

A. I think they are about twenty-five by forty.

Q. Each one of them?

Mr. Minard: They are not all the same shape.

A. Some are a little larger than others. An average would be about twenty-five by thirty.

Q. Those are little buildings which appear between the circular piles and the railroad tracks, is that correct?

A. Yes.

Q. The water tank, how large is that?

A. I don't know. I don't know the capacity of that.

Q. That is the tank which is located, so far as the diagram goes, just above the building which constitutes the office?

A. That is right.

Q. The office is located in between the piles of coal, isn't that right?

A. That is right; in front of the pile.

Q. You say that you use that in the operation of the coal plant; that is used in the washing of the coal?

A. If we have the kind of coal that we need to wash.

Q. I think Mr. Snyder said that you washed all that coal except buckwheat?

A. Rice and barley.

[fol. 275] Q. Rice and barley are the two that are not washed?

A. That is right.

Q. I think on your previous testimony you testified that considerable of this coal was sold in this neighborhood?

Mr. Minard: He didn't say any such thing.

Mr. Chandless: He can deny it.

Mr. Minard: Well, he does deny it. These are trap questions. You are a trap shooter, but you are not a cross examiner.

A. For what period are you referring to?

Q. What do you mean, "what period"?

A. That this coal was sold in that neighborhood?

Q. You previously testified to a portion of this coal being sold in the neighborhood.

Mr. Minard: When did he testify to that?

Mr. Bain: I ask that he be confronted with the testimony given before.

A. The bulk of the busines was with the Edgewater Coal Docks.

Q. Don't you load coal for points in New Jersey?

A. Oh, yes, we have some accounts in New Jersey. We have had them in Maine and Massachusetts, Long Island.

Q. As a matter of fact, that yard takes care of most of Northern New Jersey, and has for years?

A. No. I would say the plant was more of a tidewater business.

Q. But it does do some local business?

A. Some local business.

Mr. Minard: Mr. Chandless, there is not a ton of coal that is sold at that plant. That has been testified to by so [fol. 276] many people that handle the business. I don't see why this witness should be asked that question and be trapped into an answer.

The Witness: It is not sold at the plant, but stored at the plant for some local customer.

Mr. Minard: Who bought it in Pennsylvania.

The Witness: What I mean by local is Passaic and Bogota.

Mr. Bain: Mostly industries who use the coal?

The Witness: That is right. There is nothing sold.

Q. As a matter of fact, you had a lot of coal there for Bogota, or did have?

A. We had some for Bogota. We have some yet.

Q. You said that you were on Pattison & Bowns' payroll for a short time? I think you said you had been there from 1929. About how long were you on Pattison & Bowns' payroll?

A. I don't know whether it was a year or not. Something like that.

Q. The balance of the time you were on the Independent payroll?

A. Yes.

Q. As I understand it, the Independent Warehouses paid you a salary to carry on this business, as you have described it, is that right?

Mr. Bain: From what time on.

Mr. Chandless: From 1930 on.

Q. When was that, this period that you were on Pattison & Bowns' payroll?

A. That was around 1930.

Q. From 1930 on you were on the Independent Warehouse's payroll?

A. That is right.

[fol. 277] Q. And you were getting the same money that you get now?

A. No.

Q. Or about the same money?

A. It is about the same.

Mr. Chandless: That is all.

Redirect examination.

By Mr. Minard:

Q. Mr. Thompson, you spoke about most of the coal going to the Edgewater Dumpers. At the dumpers is it loaded into barges and continued in shipment to final destination?

A. Yes.

Q. That is a continuance of the shipment into storage?

A. Yes.

Q. This coal that belongs to companies in New Jersey, that coal all comes from Pennsylvania on this tariff arrangement, doesn't it?

A. Yes.

By Mr. Bain:

Q. This dumper that you speak of is a dumper used for dumping coal out of coal cars into barges or vessels?

A. That is right.

Q. For continued transportation?

A. That is right.

By Mr. Chandless:

Q. About how long does this coal stay there? In other words, it comes in in carloads of about how much?

A. It is hard to say. We dump it one day and pick it up the next week, and, then again, it will lay there for a year.

Q. Normally, could you fix a period of time as to about how long it stays there?

A. That is pretty had to say. It all depends on the demand.

Q. Would you say that the last three years, 1941, 1942 and 1943, are years in which the demand exceeded the supply? Is that correct?

[fol. 278] A. That is probably from a mining standpoint. They might know; but in our place we just fill the orders as they request.

Q. You said something about it depending on the demand. In other words, the coal is moved out pretty fast now? You know that?

A. Not out of our place. It is not coming in.

Q. In other words, the customer cannot get it from the mine? Is that the situation?

Mr. Minard: How does he know that?

A. I don't know.

Mr. Chandless: All he has to do is to tell us he doesn't know.

Mr. Bain: As a matter of fact, the coal has got to be shot right to the destination now. There is such a rapid demand for it, and they cannot build up a stock pile as they have done before.

Q. Prior to 1941 they were able to build up the stock pile, is that right?

A. Well, I would say our tonnage is better than it has been since then.

Q. The coal came in, normally, in the late spring and summer?

A. Well, I would say in the summer, the late summer. We bill our coal out up until the late spring.

Q. Then you build up a stock pile, and it starts moving out about, when?

A. About December.

Q. When does the yard get, ordinarily, to its lowest point?

A. I would say, actually, in the spring, when our winter business is over.

Mr. Minard: You don't have to guess at that. Our exhibit shows on the first of each month the amount of coal in storage, so you don't have to guess at anything there.

[fol. 279] Q. Then, you say the average period of time for coal there in normal times would be about six months?

A. No.

Q. You say that it comes in in the late spring and goes out in December?

A. It wouldn't go out in December because there would not be a demand for it.

Q. All this coal comes in consigned to Coalberg, is that correct; I mean the destination?

A. It is consigned to Coalberg, Rochelle Park, for storage.

Mr. Chandless: That is all.

Redirect-examination (continued).

By Mr. Bain:

Q. This storage at Coalberg is overlapping, isn't it? That is, one shipper might place 50,000 or 100,000 tons of coal in that plant in the spring, and he might dispose of it or trans-ship or re-ship the whole 50,000 tons by the fall, until he might not have any coal stored over the winter. That is one instance? Might that not occur? He might ship from the mines for storage 50,000 tons, to be stored at the coal storage plant, and he might order that entire 50,000 tons re-shipped before a year expires?

A. Yes.

Q. He might order it shipped at the end of one month, two months, three months?

A. As I said before, it might go out the next week.

Q. If he did that he might put in an additional 50,000 tons during the summer?

A. Yes.

Q. He might dispose of that 50,000 tons before the following winter?

A. That is right.

Q. Or he might put in 75,000 tons in the spring and dispose of 50,000 tons before the next winter season, and he would have 25,000 tons left?

A. Yes.

[fol. 280] Q. Another shipper might put in 100,000 tons in the early spring and sell 100,000 tons before the next shipment, and another shipper might put in 50,000 or 100,000 tons in the late summer and sell 75,000 tons in that month, which would leave 25,000 tons over for the following season. It is an overlapping storage?

A. Yes.

Q. It is not the same identical coal that is carried along for any continuous period? It is coal brought into the plant at different times?

A. Yes.

Q. Although that shipper might have coal brought in there for two years, it would be a different shipment of coal at the end of two years than he might have at the beginning, if I make myself plain?

A. No, I don't get that.

Q. The coal that may remain there for two years, belonging to any one shipper, is not coal that was received at the beginning of the two-year period and remained there continuously for the two years; in other words, he might have received coal at the beginning of the period and sold it, put in other coal and sold that, put in some other coal, and that would be there at the end of the two-year period. All that coal belonging to that shipper would not have been there for two years, is that correct?

Mr. Bain: That is all.

By Mr. Chandless:

Q. But, if the shipper's business was bad, he might ship in 50,000 tons, and it might lay there for a year and a half, isn't that right?

A. If his business was bad? Not today.

Q. Depending upon what conditions might be in the trade?

A. Yes.

Mr. Chandless: That is all.

[fol. 281] CERTIFICATE OF SUPREME COURT EXAMINER

New Jersey Supreme Court

INDEPENDENT WAREHOUSES, INC., a corporation of the State of New York, Pennsylvania Coal Company, a corporation of the Commonwealth of Pennsylvania, and Erie Railroad Company, a corporation of the State of New York, intervening parties, Prosecutors,

vs,

WILLIAM SCHEELE, Recorder of the Township of Saddle River, and the Township of Saddle River, a municipal corporation of the State of New Jersey, Defendants

JAMES THOMPSON, Prosecutor,

vs.

WILLIAM SCHEELE, Recorder of the Township of Saddle River, and the Township of Saddle River, a municipal corporation of the State of New Jersey, Defendants

I, Louis Kabot, a Supreme Court Examiner of the State of New Jersey, do hereby certify that the foregoing depositions [fol. 282] of Francis J. Brust, Fred V. Lynn, Roy W. Radcliffe, David D. Jamieson, Thomas J. Snyder, John T. McCormack and James Thompson, witnesses on behalf of the Prosecutors in the above entitled matters, were taken by and before me at the time, place, and on the date hereinbefore set forth; that the witnesses were first duly sworn be me according to law; and I further certify that the foregoing is a true and accurate transcript of the testimony as taken.

Louis Kabot, A Supreme Court Examiner of New Jersey.

[fol. 283] Testimony

Transcript of stenographic notes of testimony taken in the above entitled matter at the offices of Chandless, Weller & Kramer, Esqs., 84 Main Street, Hackensack, New Jersey, before Nicholas Bindseil, a Supreme Court Examiner.

APPEARANCES:

Ralph W. Chandless, Esq.
Robert J. Bain, Esq.
Duane E. Minard, Esq.

Mr. Chandless: I know that Mr. Fox wants to get away so I will put him on first. Will you come over here, please, Mr. Fox?

FRANK J. FOX, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct-examination.

By Mr. Chandless:

Q. Mr. Fox, you are in the coal business?
A. Yes, sir.
Q. And located at Fairlawn in New Jersey?
A. Yes.
Q. And you have been in the coal business how long?
A. Sixteen years.
Q. Are you familiar with the values of coal at Saddle River Township in Bergen County, New Jersey?
A. Yes, sir.
Q. I show you what appears to be a price list of Pattison & Bowns, as of November 24, 1943, and I ask you whether, [fol. 284] can you tell us, or does that represent the value of coal as of the present time?
A. Yes.
Q. Will you give us in figures the value of a ton of grate coal at Saddle River Township?
A. A ton of grate coal at Saddle River Township is $8 per net ton and with a cash discount of fifteen cents a net ton. Along with that you have a gross freight rate of $2.30, bringing it to a net ton shipped at the mines, $8, as based on that, to a $2.05 net ton, on grade A stove and chestnut——
Q. —which places the total at $7.85 plus $2.05?
A. That is right.
Q. Now, is there any other item of taxes which goes into the cost of coal at Saddle River Township?

Mr. Bain: I object unless he knows.

Q. If you know.
A. No, there *is* no other taxes.
Q. Isn't there a four-cent per ton transportation tax?
A. There is a four-cent federal tax which, of course, is passed right on through the trade.
Q. Is that included, I am asking?
A. It should be.

Q. In other words, it doesn't go on top of that?

A. No.

Q. Then, you would say that grate coal at Saddle River Township would be $7.85 plus $2.05 or $9.90, is that correct?

A. Yes, sir.

Q. Will you give us the figures as to egg coal?

A. Egg coal?

Q. Yes. Will it be the same?

A. Yes. I cited egg, grate, stove and chestnut, all being of the same freight rate and same price per net ton.

Q. The same discount?

A. Yes.

[fol. 285] Q. What have you got to say as to pea coal?

A. Pea coal, $6.45, with a cash discount of ten cents a ton and a net freight rate of $2.01.

Q. Per ton?

A. Yes, per ton.

Q. Or a total of what?

A. And the ten cents discount, bringing it down to $6.35 and $2.01 freight.

Q. Or $8.36, is that right?

A. Yes.

Q. What about the buckwheat coal?

A. Buckwheat coal is $4.80 with a ten-cent discount. That has a $2.39 gross freight rate with a net of $2.14. The same thing applies to buckwheat, rice and barley. The price of rice coal at the mines, F. O. B. is $3.85, with a cash discount of five cents, and bringing the price down to $3.80, F. O. B.

Q. All right. Now, it is a total of how much at Saddle River?

A. Bringing it up to $5.94 per net ton.

Q. Now, what have you got to say as to barley?

A. Barley, F. O. B. at the mines, is $2.85 with a cash discount of five cents, $2.14 freight rate, five cents a ton discount, which is $4.94.

Q. We want the total, what is the answer?

A. $4.94 on the barley.

Q. Now, those prices are presently O. P. A. prices?

A. Yes, sir.

Q. What have you to say as to those prices as compared with prices of other mines?

Mr. Bain: If he knows.

Q. If you know?

A. They are the same as the prices from other circulars I received from other operating companies. They are in line.

Q. How much increase in prices has there been, if any, during the past, since 1941?

A. Since O. P. A. went into effect, there was an increase [fol. 286] of price of seventy cents. It went into effect on November 24, 1943, allowed by the O. P. A. Those prices continued up to February 1, 1944, when the O. P. A. granted an increase of forty-five cents a ton for the month of February only.

Q. Then it was taken away?

A. Yes, it went back, it has gone back to the price of January.

Q. When?

A. Of January in 1944.

Q. So, then, do the prices that you have given us, compare with the prices in 1941?

A. The present prices as to 1941?

Q. Yes. About how much difference is there? You don't have to be exact.

A. There was another difference there. It is about the same since 1941. That is the circular price.

Q. So, that there has not been much variation in values during the last seven years?

A. In the last few years, not several years.

Q. Well, since 1941 on, the price has been more or less standardized at about those prices?

A. Yes. They vary. You have your summer prices. There are the reductions and, of course, there is a period where they increased so much each month.

Q. Can you tell us who Pattison & Bowns are?

A. They are in my opinion——

Mr. Minard: We don't want his opinion.

Q. Are they located in Saddle River Township?

A. Yes, sir. They are located at Saddle River Township.

Mr. Chandless: I will offer this in evidence. Cross-examine.

(Received as Exhibit D-1.)

[fol. 287] Cross-examination.

By Mr. Minard:

Q. When you say Pattison & Bowns are at Saddle River Township, do they have an office there?

A. Not from a selling angle, no.

Q. Do they have any office there?

A. Well, clerical work.

Q. Who works for them doing their clerical work?

A. Pattison & Bowns?

Q. Yes.

A. I just forget the gentleman's name now.

Q. Are you talking about one of these gentlemen here?

A. Yes, sir.

Q. They don't work for Pattison & Bowns?

A. That is the gentleman I met over there (indicating a man seated at the counsel table).

Mr. Chandless: It is in his opinion that he worked for Pattison & Bowns.

Mr. Minard: I didn't ask him for his opinion.

Q. Did you ever do any business with Pattison & Bowns at Saddle River?

A. No.

Q. So that is just your impression, that which you are talking about, is that right?

A. Well, yes.

Q. All right. Now, this is the winter prices for 1943 and 1944, aren't they, in that price list you have given?

A. Yes, sir.

Q. What were the prices in May of 1943?

A. May of 1943?

Q. Yes.

A. Those prices are—may I refer to my own circular?

Q. What is that?

A. May I refer to my own circular?

Q. Well, if you have any definite information—what are you referring to now?

A. To the Delaware, Lackawanna & Western Coal Company.

[fol. 288] Q. Of what date?

A. This was printed on January 7th and it went into effect in January of 1943.

Q. Covering what period of time?

A. The period of time up until the following change was made on November 24, 1943.

Q. That covered the period from January to November of 1943?

A. Yes.

Q. What was the difference in prices between that period, from the one of 1943 onward, that you referred to?

A. Seventy cents a ton.

Q. Less?

A. More.

Q. What? In the summer time more than in the winter time?

A. Well, it went through the entire period. The prices were set up by the O. P. A. on January 9th, which went through at seven-thirty at that time, went through to November 24, 1943.

Q. And then the price went up to $8, is that right?

A. Yes.

Q. Now, then, prices are now controlled by the O. P. A., are they not?

A. Yes, sir.

Q. Now, this price of coal that you refer to as F. O. B. Mines, isn't it?

A. That is right.

Q. On a short ton of two thousand pounds?

A. Yes.

Q. Now, this price list that you say, that you refer to in the beginning, Pattison & Bowns price list states our prices for Pittston coal as authorized by the Office of Price Administrator and effective November 24, 1943, and until further notice, per net ton of two thousand pounds, F. O. B. mines, with discounts and so forth, as you have stated it, is that right?

A. Yes, sir.

Q. That was merely an announcement of O. P. A. prices, wasn't it?

A. Well, published by the O. P. A. We also have circulars in our office.

[fol. 289] Q. Well, O. K. Do you buy coal from Pattison & Bowns?

A. No.

Q. You never bought any coal from them?

A. No.

Q. You never had any business relations with them?

A. No.

Q. How did you come to be talking with one of these gentlemen there?

A. I happened to notice him for a year back. He approached me for installations of a stoker in his home. I was at the office.

Q. That was a private transaction between you and which one?

A. Mr. Thompson.

Q. You didn't know, of your own knowledge, who Mr. Thompson's employer was, did you?

A. No, I don't know offhand. I could find out. I think when he made application, I have that information.

Q. Well, he can tell you himself for that matter?

A. Yes, sir.

Q. Now, those are the prices to retail dealers, is that right?

A. Retail dealers?

Q. Yes.

A. Yes.

Q. What the prices are at the mines, you do not know, do you?

A. Whether I know what the prices are at the coal mines?

Q. Yes, do you?

A. Certainly. It tells you right in the circular, F. O. B.

Q. You don't know what Pattison & Bowns pays at the mines, do you?

A. According to the O. P. A. ruling they are supposed to pay circular prices.

Q. Yes, but that is not this price, is it?

A. No.

Q. You said that the federal transportation taxes, as I understand you to say, that the federal tax is not added to the price of coal that you sell it for?

A. Yes.

[fol. 293] Q. So the retail price includes the four cents per ton?

A. Yes.

Q. A flat rate?

A. Yes.

Q. Now, what was your selling price on these coals at the time?

A. What do you mean?

Q. For instance, grate coal as listed here, $8 minus fifteen per cent discount?

A. We sold it for $.54 net ton and delivered into the customer's coal bin.

Q. What expenses did you absorb in that difference? Did you absorb the four cents a ton federal tax?

A. I absorbed it to the wholesale company, in other words, when I am buying from the Pattison & Bowns Company, they charge per ton so much and then on the bottom is the tax of four cents per net ton. We pass it on to the customer.

Q. Do you pay the freight rates on that coal?

A. Yes, sir.

Q. Plus the price listed here of $8?

A. Yes.

Q. Was there any other charge that you absorbed except the freight rate?

A. No.

Q. That, of course, is included in your retail price?

A. That is right.

Q. So, the difference between $8 minus the fifteen per cent discount, plus the freight rate and the retail price was your profit or your compensation for operation?

A. Yes.

Q. All right. Now, assuming it was necessary to add to the price of this coal a $1.50 per ton for license fee, would that affect the source of purchasing coal?

A. I would not know. I am only concerned with what I can buy it for and in my spread of margin and to continue to stay in business.

Q. If because a different company, or a given company, stored coal at Coalburg and a license fee amounted to $1.50 a ton, you would not buy coal from that concern?

[fol. 291] A. I would if they were under O. P. A. ruling and circular prices. Otherwise, that is none of my business.

Q. If that had to be added to the price of coal, anywhere along the line, you would not buy coal there?

A. Well, it is up to them to meet the other operators' prices. If they are charging $1.50 more, they would not do any business.

Q. What would be the effect of twenty-four cents increase on that coal, would that interfere with it?

A. No. We generally apply before the O. P. A. and we find that we can't operate, that there has been an increase, affecting our profit, it is up to the O. P. A. to grant us an increase. However, they don't always.

Q. If one coal company because it stores at Coalburg had to charge twenty-four cents a ton more, you would not buy from that company?

A. You have a coal company which is a retailer and operator and which is a wholesaler.

Q. Pattison & Bowns don't mine coal, you know that?

A. Yes, sir.

Q. If a wholesaler had to charge twenty-four cents a ton more because he stored at Coalburg, would you buy coal from him?

A. Not if it is going to make a difference in my profit. You have your prices set up both wholesale and retail by the O. P. A. They can't go out and get more.

Q. In other words, they cannot increase the prices of their coal?

A. Unless the O. P. A. granted it.

Q. If the O. P. A. granted to a coal company, which stored its coal at Coalburg, twenty-four cents increase a ton, you would not buy from that company, would you?

A. I would, if they were still in the circular.

[fol. 292] Q. If you could buy from one company at $8 and have to pay $8.24 to another company, you wouldn't buy from it, would you?

A. (No answer.)

Q. Would you or wouldn't you?

A. No, I would not.

Q. Then, all right. If the increase was twenty-one cents per ton, you would not buy from a concern that you had to pay twenty-one cents more per ton to, would you?

A. Yes, if the quality was there and if the O. P. A. granted it, I would.

Q. So that the twenty-one cents wouldn't bother you at all?

A. Twenty-five cents you can always get as a premium if you have the quality.

Q. If you had an opportunity to buy from the source or Pattison & Bowns, and it was twenty-one cents different, where would you buy the coal?

A. From my regular outfit.

Q. You would not pay the twenty-one cents?

A. No

Q. You don't have a coal yard in Saddle River Township, do you?

A. No, in Bergen County.

Cross-examination.

By Mr. Bain:

Q. Are you a retail coal dealer?

A. Yes, sir.

Q. Not a wholesaler?

A. No.

Q. You haven't bought coal F. O. B. at the mines?

A. Yes, I bought thousands of tons.

Q. You still buy it that way?

A. No. I generally call up the main office and tell them to ship me four nut or four stove or ten pea, whatever it may be, and they have their own way of transaction. I bought coal on the ground and watched it go through the breakers.

Q. How long ago was that?

A. In 1936.

Q. And since that time you bought no coal F. O. B. at the mines?

A. No.

[fol. 293] Q. And you say you called up the main office, do you mean the main office of a wholesaler?

A. That is right.

Q. That is one who deals wholesale in coal?

A. Both.

Q. How long did you buy Pittston coal?

A. I never bought any.

Q. You always bought from the other mines?

A. Since we started Blue Coal, the D., L. & W.

Q. You never sold any coal under the name of Pittston?

A. No.

Q. You produced a circular here and gave some testimony from it as to the prices of Pittston coal at the mines, with some subtractions and additions?

A. Yes.

Q. They are those what you might call prices to the wholesaler?

A. The circular?

Q. Yes, do they show prices to the wholesaler?

A. No. The wholesaler shows prices to the retailer.

Q. What do the prices show on the circular?

A. To the retailer.

Q. To the retailer?

A. That is right.

Q. And then you say that the prices at which the retailer sells to the consumer are considerably higher in order to take care of the retailer's operating expenses and profit?

A. That is right.

Q. The wholesaler prices are indicated by the circular and the retailers' prices to the consumer are fixed by the O. P. A., are they not?

A. Definitely so.

Q. And they have been that way how long?

A. Since 9/43. And that is when the federal tax went into effect also.

Q. I think you testified that the prices shown upon the circular, from which you testified, the retailer prices can-
[fol. 294] not be increased to take care of any additional expense without the consent of the O. P. A.?

A. Yes, it is by order issued by the O. P. A.

Q. Are you sure the freight rate on buckwheat coal is $2.39; rather, isn't it $2.38?

A. Well——

Q. At any rate, it is a small detail.

A. No. It is $2.39.

Q. Well, it's a detail anyway.

A. It is $2.38 here.

Q. The prices charged by the retailer to the consumer fluctuate with various seasons, do they not?

A. They have in the past, but they have been uniform during the past two years.

Q. Mr. Fox, is your entire knowledge as to the prices of Pittston coal taken from this circular?

A. No, because I don't purchase coal from them.

Q. Your answer is yes?

A. After all, if they send me circulars out and the salesman goes out and makes another proposition, it is not to my knowledge.

Q. Have you any other knowledge as to the prices and deductions charged to wholesalers for Pittston coal other than that mentioned in this circular?

A. No, I don't know.

Q. Your entire testimony is taken from the circular?

A. That is right.

Q. When did you get that circular?

A. This particular circular?

Q. Yes.

A. I think that circular is out on November 24, 1943.

Q. When did you get it?

A. Well, it comes in regularly through the mail. What date it was, I don't know. We get the different companies', we get their circulars right along. We are on their mailing lists, whether we buy from them or not.

Q. You never sold any Pittston coal during the last several four or five years?

A. No.

[fol. 295] Q. You don't know the prices charged by the Pittstown Coal Company to the consumer except from prices fixed by the O. P. A.?

A. What do you mean?

Q. The prices charged by the retailer to the consumer of Pittston coal?

A. Yes. The same prices. That is an O. P. A. ruling.

Q. It is a uniform price?

A. Yes.

Q. And the only knowledge you have *to* the prices charged for Pittston coal is that obtained from the O. P. A. price list?

A. That is right.

Q. I think you said that those prices fixed by the O. P. A. cannot be changed except with consent of the O. P. A.?

A. That is right.

Q. If some additional charge, to either the wholesaler or the retailer, was placed upon the coal, would that charge have to be added to the price charged by the retailer?

A. No, not particularly. We have one ruling to go by. We cannot increase or decrease our prices other than file with the O. P. A. The same thing applies to the wholesaler.

Q. That is, there could be no addition to the price charged for the coal at the mines to the wholesaler and no addition to the price charged by the wholesaler to the retailer and no addition to the price charged by the retailer to the consumer without the approval of the O. P. A.?

A. I would not go back that far because I am not acquainted with them. I wou'dn't know what happened to the producer and the wholesaler.

Q. In any event, as far as the wholesaler and retailer is concerned, there can't be anything added to the prices without the O. P. A.'s approval?

A. Yes, sir.

Q. And that has been proved for the last two years?

A. That is right.

[fol. 296] Q. You sell in Saddle River Township?

A. Yes, within a fifteen-mile area.

Q. That includes Saddle River Township?

A. Yes, sir. Today it is different. We have zones set up by the O. P. A., and whatever zone you have, that is the price they set up.

Q. Your prices in Saddle River Township are the same as charged by any other dealer in that district for coal delivered to the consumer?

A. Yes, sir.

By Mr. Minard:

Q. Now, just a question or two. Do you use field storage?

A. Ground storage?

Q. Yes.

A. Yes.

Q. How do you operate that?

A. Why, we have conveyors to unload our cars in to the storage bins, which is just dumping out that square box and it goes down to the ground.

Q. What I mean by field storage is, do you have a warehouse company that handles that coal for you and issues warehouse receipts for it?

A. No.

Q. Why did you select this circular of November 24, 1943, if you have them regularly?

A. That is the last one that has been issued.

Q. All right. That is all.

By Mr. Bain:

Q. I want to ask you a further question. Where is your yard located?

A. My yard is located at 1 Erie Place, Fairlawn, New Jersey.

Q. Fairlawn adjoins Saddle River Township, doesn't it?

A. One part of it, yes.

Q. You don't have to pay any license as a coal dealer in Fairlawn, do you?

[fol. 297] Mr. Chandless: I object on the ground that it is immaterial. It is a different municipality and isn't or wouldn't be binding on the defendants in this case whether he paid taxes there or didn't pay taxes. All right, you may answer now.

Q. Do you have to pay any license fee as a coal dealer having a yard in Fairlawn?

A. We pay one to the state and that is all.

Q. What license fee do you pay to the state?

A. A truck license.

Q. That is a truck license and nothing else?

A. Not the motor vehicle license. It is what they call a coal dealer license.

Q. What sort of license is it?

A. It is a tag.

Q. Is it a license to operate trucks?

A. No. You do operate a coal truck, yes.

Q. But, it is not a license to do the coal business, the coal retail business?

A. Every truck in the state of New Jersey has to be listed.

Q. Whether it is a coal truck or any other kind of truck?

A. It is a fuel license, and has nothing to do with the truck.

Q. Oil trucks pay the same license fee?

A. Oil trucks, I don't know.

Q. That is a license to operate trucks, isn't it?

A. Over the road, yes.

Q. Over the roads.

A. Yes, sir.

Q. That is not a license to do the coal business?

A. Yes, sir. You also have to have, if you are in the coal busines, you have to have that license tag on your coal truck with a registered number.

Q. That is the same kind of license as a store would have in the event it uses delivery trucks, isn't it?

A. Not motor vehicle licenses. Is that what you refer to?

[fol. 298] Q. Isn't this a motor vehicle license you are speaking of, it is a truck license?

A. It is a coal truck license. The license tag is a motor vehicle license. It is two different licenses.

Q. But the state has no license for carrying on of a coal business, has it?

A. No. This license tag is a weights and measures license tag to operate a coal truck.

Q. It is under the weights and measures department?

A. Yes.

Q. But, there isn't a coal dealer's license issued in the Town of Fairlawn, is there?

A. Yes, sir.

Q. There is none?

A. No.

Q. You sell in competition with coal delivered to the consumers in Saddle River?

A. There is competition wherever we go.

Q. Are there any other coal dealers operating in Saddle River Township?

A. I don't know of anyone registered right in the Township, that is, a siding and operating a yard.

Q. You don't know of any other coal yard?

A. Other than Ferrara, no.

Q. Is there one that you know of in Saddle River Township?

A. Yes.

Q. There is one coal yard in Saddle River Township?

A. Yes, sir.

Q. Do you know what kind of coal that yard handles?

A. No.

Q. But you do sell in Saddle River Township, don't you?

A. Yes, sir.

Q. That is all.

By Mr. Minard:

Q. How many municipalities do you do business in, in the coal business?

A. In Hawthorne, Haledon, Paterson, Fairlawn, East [fol. 299] Paterson, Clifton and Saddle River, Rochelle Park, Arcola and Paramus and Ridgewood and Glen Rock.

Q. Do any of those in these municipalities have a licensing ordinance to conduct a coal business?

A. I don't conduct a coal business.

Q. You do business in those municipalities?

A. Yes.

Mr. Chandless: I object to this.

Q. Do any of those municipalities impose a business license fee for doing a coal business?

A. To deliver in that town, no.

Q. To conduct any coal business?

A. I don't know. I know only about my own community.

Q. You have no municipal license in Fairlawn?

A. My yard is in Fairlawn. Deliveries are made in these towns.

Q. Do you have any municipal licensing ordinance in Fairlawn applying to coal yards?

A. None other than our regular taxes and that is high enough.

Q. Of course it is. We all realize that. Do you know whether there is a licensing ordinance in any of these municipalities to conduct a coal business?

A. Not to my knowledge.

By Mr. Bain:

Q. Where is the wholesaler's yard located from where you get coal?

A. Where the yard is located, the wholesaler from whom I get my coal?

Q. Yes.

A. I get my coal in by car load.

Q. It comes by car load lots?

A. That is right.

Q. All right, that is all.

By Mr. Chandless:

Q. Mr. Fox, you, of course, pay taxes?

A. Yes.

Q. You stated you pay taxes to Fairlawn?

[fol. 300] A. Yes, to store my coal. When the tax assessors come around, in fact, I——

Q. Just answer my question.

A. Yes.

Q. All right, now. You say when you buy coal that it comes by car, is that right?

A. Yes, sir.

Q. To your knowledge of the coal business, it would be very convenient for the wholesaler to have a place of storage, wouldn't it, whereby he can deliver that coal whenever he wants it without having to come through the mines?

A. Mine delivery is a whole lot longer.

Q. And that convenience, having the coal right located close at hand is worth something in money, isn't it?

A. Yes, I would say so. If I were buying from P. and B., it would be a convenience.

Q. And the O. P. A. regulation, there is no question, in your mind that they make Pattison & Bowns, or anybody else, their prices the same as the prices you buy?

A. Yes.

Q. No question about that?

A. Yes.

Q. Now, as a matter of fact, before the O. P. A. regulations, all the big wholesalers had about the same prices?

A. Yes.

Q. All maintained about the same prices?

A. Yes.

Q. As a matter of fact, they were, before the O. P. A., they were identical prices, to a penny, won't they be so, between the big wholesalers?

A. They just come out, furnish a maximum circular price, that is all, and the discounts the same all over.

Q. No difference in the prices?

A. No.

Q. You said that the prior scale of prices was seventy cents a ton less, January 9, 1943. Now, you meant seventy cents a ton less on egg, stove, chestnut coal, didn't you?

A. Yes, sir.

[fol. 301] Q. What was the price or prices on the others in January?

A. January 9, 1943?

Q. Yes.

A. Well, all we do, we go by the circular.

Q. The mine price, by the circular?

A. Egg, stove and chestnut, there was a seventy-cent differentiation.

Q. What were the other kinds of coal, as appears on your circular? Will you give us the price of those?

A. I think, if I can recall right——

Q. Give them right off the circular.

A. $7.30 for broken, $7.30 for the egg, $7.30 for stove, $7.30 for chestnut, and pea $5.75; for buckwheat $4.20, rice $3.35, and barley $2.50.

Q. That is all.

By Mr. Minard:

Q. Now, Mr. Fox, did you ever buy any coal from any local wholesaler, local storage yards, storage yards of any wholesaler?

A. Why, some retailers consider themselves wholesalers.

Q. I am asking you a question.

A. Not to my knowledge, no.

Q. Do you know of any, of the existence of any local supply yard from which retailers can purchase from wholesalers?

A. No.

Q. All right. Now, do you know why the prices are lower from January to November than they are through the winter?

A. January of this period that you are speaking of to November?

Q. Yes.

A. Other than they want to encourage sales probably.

Q. Isn't that because they want to move as much coal during the summer open season as possible and to avoid congestion during the winter season when the demand is so great?

A. Yes.

[fol. 302] Q. To avoid the congestion that would follow if all the coal was ordered in the winter time when the sales are active?

A. That is right.

Q. That is all.

By Mr. Bain:

Q. As to these increases in prices made in November, 1943, were they increases in the prices F. O. B., the mines, or in prices paid by the wholesalers or by the retailer or by the consumer? What I want to know is whether that seventy cents, for instance, that you mention as the increase in November, 1943, was in the price charged by the retailer to the consumer?

A. The price increase of November, 1943, was granted to the wholesaler by the O. P. A. and we could only follow the wholesale increase. In other words, the dealer got no more, just passed it to the consumer.

Q. In other words, every increase allowed by the O. P. A. was passed along to the consumer. That is all.

Mr. Chandless: That is all, Mr. Fox. Thank you.

CONDITO BELLI, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Chandless:

Q. Mr. Belli, are you the clerk of the Township of Saddle River?

A. Yes, sir.

Q. And did you, at my request, furnish records of the Township?

A. Yes.

[fol. 303] Q. Will you tell us what the present liquor license fees are as fixed by the Township Committee of the Township of Saddle River?

A. $250.

Q. For a retail consumption license?

A. Yes, sir.

Q. That is the ordinary saloon or tavern?

A. Yes.

Q. What was it previously?

A. $300.

Mr. Minard: Previous to what date?

The Witness: I will have to look it up, I will have to look the ordinance up on that. The original ordinance was on December 8, 1933.

Q. That was for how much?

A. $300.

Q. When was the change made?

A. June 12, 1936. That was reduced to $250.

Q. Is there an ordinance of the Township of Saddle River enacted by the Board of Health providing a license fee for rendering plants?

A. Yes.

Q. I show you a copy of an ordinance which was adopted on March 23, 1934, and ask you if you can tell us what the

license fee for a rendering plant was as prescribed by that ordinance?

A. It was $500.

Q. And is this in addition to the license fee prescribed by the ordinance of the Township Committee, is that correct?

A. Yes, sir.

Q. In other words, the license fee, as far as that rendering plant went, was under the two ordinances, $1,000, is that right?

A. That is right.

Q. Now, subsequently, on January 10, 1941, the Board of Health ordinance was amended, is that correct?

A. Yes, the Board of Health ordinance was amended.

[fol. 304] Q. And by that ordinance, what was the license fee fixed at?

A. The license fee for the Board of Health was fixed at $350.

Q. That $350 was in addition to the license fee of the Township Committee, is that correct?

A. That is right.

Mr. Bain: Well, now, is there anything of record to show that?

Mr. Chandless: His testimony plus the ordinances. You don't want the whole ordinance put in?

Mr. Bain: Does the ordinance state it is in addition?

Mr. Minard: When you say in addition, what was the Township license fee at that time?

The Witness: The first time $1,000. $500 to the Township and $500 to the Board of Health.

Mr. Minard: On January 10, 1941, you say it was changed to $350. What was the Township ordinance at that time?

The Witness: $150.

By Mr. Chandless:

Q. So, the total fee for rendering plants was $500 as a result of the changing of the ordinances?

A. Yes, that is right.

Q. Now, will you give us the tax rate at Saddle River Township from 1928 to date?

A. In the year of 1928 it was 5.82 and in 1929 it was 5.90 and in 1930, 5.78 and in 1931, 5.86.

Q. And 1932?

A. It was 5.80 and in 1933 it was 5.32 and 1934 it was 6.17 and in 1935 it was 6.40 and in 1936 it was 5.61 and in 1937 it was 5.15 and 1938 it was 5.53 and 1939, 5.40 and in [fol. 305] 1940, 5.85 and 1941, 5.76 and 1942 it was 5.85 and 1943 it was 5.75 and 1944 it was 5.83.

Q. Now, calling your attention to the assessment roll of the Township of Saddle River, I ask you whether or not there was an assessment for coal levied on coal at Coalburg from 1928.

A. There was a personal assessment on the coal stored at the Coalburg yards.

Q. And that continued right along into what year?

A. That continued down to 1942.

Q. And then what happened in 1942?

A. In 1943 it was taken off the assessment by the County Board of Assessment and so was 1944.

Q. And was the assessmeat paid each year that it was on there?

A. The assessments are paid up to and including the year 1939.

Q. Although there was an assessment levied in 1940, and 1941 and 1942, they were not paid?

A. They were not paid.

Q. Now, what was the amount of that assessment?

A. In what year?

Q. They are the same for each year, aren't they?

A. Well, in 1928 there was a $193,683 assessment and continued down to the year 1932. There is an assessment of $232,420 as a result of a twenty per cent increase ordered by the county board of assessors. In 1932, in 1933 it goes down to $193,600 and continues at that figure to the present 1942 figure.

Q. Now, you are familiar with the ordinance for licensing those engaged in the business of storing goods for hire, aren't you?

A. Yes.

Q. Was there ever any application made for a license under the terms of that ordinance by anybody for the operation of a warehouse at a place known at Coalburg in Saddle River Township?

A. No, there never was an application put in for a license.

[fol. 306] Q. Of any kind or character, either for part or all of the premises, is that right?

A. Yes, sir.

Q. I call your attention to the budget of the Township of Saddle River and particularly to the item——

Mr. Minard: What year?

Mr. Chandless: 1944, the budget for that year.

Q. And particularly to the item of miscellaneous revenues and ask you what was realized by the Township in cash in 1943 for fees and permits?

A. Fees and permits were $2,662.68.

Q. What was realized from licenses?

A. $4,374.

Q. Those represent different items?

A. Yes, sir.

Q. Is that correct?

A. Yes.

Q. And that represents the auditor's way in setting up those items, is that correct?

A. That is right.

Q. Now, those licenses and fees, when collected from residents of Saddle River Township, were in addition to personal property taxes, weren't they?

A. Yes.

Q. You are familiar with the premises known as Coalburg, aren't you?

A. I am.

Q. Now, will you tell us what is done in Coalburg so far as washing coal there is concerned?

Mr. Minard: Wait a minute. He ought to qualify with some knowledge of that.

Q. Did you ever see them wash coal at Coalburg?

A. I seen them loading cars up.

Q. What did they do?

A. As they loaded they washed the coal. They have two troughs coming down.

[fol. 307] Q. And that causes water to accumulate at that point?

A. Yes, sir.

Q. They wash that in order to get the dust and dirt out of it, is that correct?

A. That is right.

Mr. Chandless: I think that is all.

Cross-examination.

By Mr. Minard:

Q. Where does that water drain to?

A. Into the ditches.

Q. And there are ditches provided for that?

A. Yes, sir.

Q. And they are carried into Saddle River?

A. They are carried into a brook that runs into Saddle River.

Q. Do those troughs that you mentioned empty directly into the ditches?

A. They empty onto the ground and it runs from there into the ditches. Of course, there is a small ditch that leads from the trough that takes it into the ditch.

Q. How many saloons are there in Saddle River Township?

A. Twelve.

Q. You spoke about it—I withdraw that. Why were the liquor licenses fees reduced?

Mr. Chandless: Do you know?

A. Well, offhand, as far as I know, the tavern owners got together and asked for a reduction.

Q. And why was the rendering plant license reduced. Cut in half?

A. That I could not answer. I suppose you will have to get the answer from the Township themselves.

Q. Do you have any complaints about the rendering plant, the smell of it?

A. Not me personally.

Q. You know there are a great many complaints?

A. There have been a few from time to time

[fol. 308] Q. You haven't been around there lately within reach of the place?

A. I have been around there almost every day of the week.

Q. Now, this morning, for instance, I have had some experience with it. Does the smell from the plant permeate the community for a distance of a mile around it?

A. No. I would not say a mile.

Q. How far would you say?

A. I never really measured it.

Q. It is located in back of it, off the road, isn't it?

A. What do you mean?

Q. On Midland Avenue, about fifteen hundred feet off the road, and it is about the same distance, runs at right angles, just south of the plant, doesn't it?

A. No, I would say the plant is closer. If you are referring to Paley Avenue, the plant is closer to Paley Avenue.

Q. And there are houses on Paley Avenue and Midland Avenue along the front of the plant and the rendering plant is within a mile of the Coalburg yards, isn't it?

A. Yes. I would say a mile.

Q. There is an actual element of nuisance to the community about the rendering plant, isn't there?

A. Well, I suppose from time to time it does smell a little.

Q. Now, what were the tax levies, the total tax levies in the Township for 1942?

A. 1942.

Q. Yes. We will start with 1940.

A. You want the taxes, not the amount of money spent?

Q. I want the total amount of money raised by taxes. I want the total tax levy of the Township.

A. $156,750.47.

Q. For 1940?

A. Yes, sir.

Q. How much?

A. $156,750.47.

Q. Can you give me the total municipal revenue for all purposes including the amount raised for state and county taxes?

A. That is the amount. That is the total amount.

[fol. 309] Q. That is all the taxes raised in the Township that year?

Mr. Chandless: Taxes, but not other revenue.

Q. As reported to the county board of taxation.

A. Yes, sir.

Q. What is it for 1941?

A. $154,880.11.

Q. 1942?

A. $162,028.42.

Q. And for 1943?

A. That is the book I have not got with me.

Q. And 1944?

A. I haven't got 1943 and 1944.

Q. All right. When you say that that isn't all of the revenue, you mean that there is additional amounts received from fees and permits and licenses, is that right?

A. That is the total amount received in taxes.

Q. The figures that you have given us, did you receive any money from any other source?

A. No.

Q. That includes the fees and permits and licenses?

A. What?

Q. It doesn't?

A. That was the total amount that was to be needed for due taxes. These are the ones receivable.

Q. What additional amount is levied for other purposes, purposes in addition to these figures you have given us like the sub-total of miscellaneous revenues?

A. In 1941, $27,860.59.

Q. Wait a minute. The other item?

A. Subtotal of budget revenues, except new taxes, 1943, $88,311.80.

Q. Do they include the fees and permits and licenses?

A. Yes, they include the fees and permits and licenses.

Q. And what else do they include?

A. That is the whole budget.

[fol. 310] Mr. Chandless: Additional to that you have sub-total budget revenues except new taxes w ich comprises all these various items of finance, interests and costs and they total these items there, indicating to this paper.

Q. That includes receipts from deliquent taxes?

Mr. Chandless: That is it.

Mr. Minard: It would appear you are getting this amount.

(Discussion off the record.)

Q. Now, in riding around the community I notice at regular intervals there are deep ditches. What are they for?

A. In what part of the town?

Q. Around Midland Avenue and Paley Avenue until you get up to about Rochelle Parkway on the high ground. These ditches are all over, in back of the house lots and so on. Do you know what they are for?

A. They are for drainage purposes.

Q. Are they maintained by the property owners or by the municipality?

A. They are maintained by the county mosquito commission.

Q. Do they drain openly away or you have a sewer?

A. They drain into Saddle River, most of them.

Q. Do you know the extent of those ditches the length of them, in the Township of Saddle River?

A. Offhand I could not tell you.

Q. Do you know why this license ordinance was passed?

Mr. Chandless: I object.

[fol. 311] A. No, I don't know.

Q. Do you have any coal yards in Saddle River Township?

A. We have two.

Q. Is there any ordinance licensing them?

A. Not that I know of.

Q. Now, you spoke about the county board taking the assessment of coal off the tax list. Do you know why they did that?

A. Well, offhand I imagine on account of it being considered a warehouse, not taxable.

Q. You know that the Supreme Court and the Court of Errors and Appeals decided that that tax was unlawful?

A. That is why the county must have done so.

Q. You knew that fact?

A. I did.

Q. Now, you have spoken about certain amounts received from fees and permits. What kind of fees and permits are they?

A. Well, there are four for saloons, saloon licenses, plumbers' permits, fees and permits, builders' permits, peddlers' licenses and other various licenses.

Q. Licenses and a separate amount?

A. Yes, sir.

Q. Then that $2,626.90 for fees and permits is not licenses, it it?

A. No, it is not a license.

Q. Those are building permits and lots of other permits of that kind?

A. Yes.

Q. Now, the licenses include what kind of businesses?

A. They include saloons.

Q. Well, I think we can save a little time. I show you a list, an ordinance marked Exhibit P-13, it includes all those that are on that list, doesn't it?

A. I imagine so.

Q. And the saloon licenses are not in that ordinance?

A. No.

Q. It includes the saloon licenses?

A. As a license fee?

[fol. 312] Q. Yes.

A. Our ordinance calls for a license fee for the saloons.

Q. But the $4,374 for license fees include those on Exhibit marked P-13 and the saloons?

A. Yes, sir.

Q. And is there anything else?

A. That is all I know of.

Q. Are there any other licenses except this Coalburg license, that fixes the fee on the basis of square foot area?

A. No.

Q. Why was that method of license fee adopted?

Mr. Chandless: I object. He is not competent for that.

A. You will have to ask the Township Committee. They were the ones that passed the ordinance. I am not in the power to pass that. I am acting clerk.

Q. Do you know why that was adopted?

A. I could not tell you.

Q. Wast here any statement made at the time of the introduction of the ordinance that would explain that?

A. Not that I know of, offhand.

Q. Was there any statement made at the time of the Township Committee?

A. Well, I wasn't clerk at that time when it was passed through.

Q. Can you answer my question?

Mr. Chandless: I object. The ordinance speaks for itself.

A. Not to my knowledge.

Mr. Chandless: He is only a clerk.

Q. All right. Do you know anything about the ground water levels in the township?

A. A little.

[fol. 313] Q. All right. Now, then, what is the static ground water level in the equifer under the township?

A. I could not answer that.

Mr. Chandless: I object.

Q. Coming along the road, I saw where somebody dug out something in the field and the hole filled up with water. Is that the natural condition of the ground in that community?

A. Where?

Q. Along Paley Avenue, on the south side, a short distance east of Midland Avenue.

A. Well, that particular spot, they didn't dig no sod out.

Q. They dug out something eight inches deep and it filled up with water?

A. That particular spot they pulled out some stumps, stumps or trees out.

Q. This is a square space, cut out with a spade, just as if they were cutting out some sod?

A. I could not answer that question. I didn't see it.

Q. From your knowledge of the ground water condition, is that a condition that exists generally in that community, ground water within a few inches of the surface of the ground?

A. I know that section has ditches there and drains water off. If somebody digs a hole there and the following day it rains, the following day there will be water. Eventually it will evaporate.

Q. I am talking about the natural condition of the ground.

Mr. Chandless: I might say, to save time, the engineer is here. He can give you those facts.

Mr. Minard: O. K.

Q. How much vacant land does the township own or have title to for tax default or otherwise?

[fol. 314] A. Off hand I could not tell you. I will have to look up the record.

Q. Is there a considerable part of the township that the township has taken over for tax default?

A. No, there ain't so much.

Cross-examination.

By Mr. Bain:

Q. Let me ask you this, you mention the license for rendering plants as being $500 under the ordinance of March

23, 1934, and reduce to $350 under the ordinance of January 10, 1941. As a matter of fact, the license for rendering plants under the ordinance of March in 1934 was $150, wasn't it?

A. Yes, sir.

Q. And that was reduced by the ordinance in January of 1941 to $100?

A. Yes, sir. I arrived at $500 combined rendering plant and slaughter house.

Q. You included slaughter houses?

A. Yes.

Q. There is a separate license for slaughter houses, under the ordinance of 1934, and it was $350 and was reduced by the ordinance of January, 1941, to $250?

A. Yes.

Mr. Chandless: He means the Saddle River Township has a license for both.

Q. But the licenses for slaughter houses and rendering plants is separate and distinct. In other words, if one concern does rendering and a slaughtering business they pay two separate licenses, is that right?

A. That is correct.

Q. The last taxes that were paid on the coal assessed at the Coalburg plant were for 1939, weren't they?

A. Yes, 1939.

Q. And the township assessed the coal in 1940?

A. Yes.

[fol. 315] Q. And in 1941?

A. In 1942.

Q. And 1943 and 1944?

A. No. That is wiped off the books.

Q. They were taken over in 1943, after the township had included them along — its assessments returned to the county board on the tax duplicates and after the taxes on the coal had been included in the tax levy and appeals taken to the county board?

A. They were taken off by the tax assessors, as I understand it, through the orders of the county board of assessors.

Q. After the taxes were levied on the coal for 1943?

A. That I could not answer.

Q. I can tell you that that is the fact.

A. The assessors levied—I didn't know.

Q. They were on the assessment roll and the tax bill was sent out on them and the appeal was taken to the Bergen County Board of Taxation and they ordered them cancelled. That is what happened, wasn't it?

A. I am not in a position to answer that. It is the board of assessors that took it off.

Q. Do the assessments on the coal stored at Coalburg for 1940 and 1941 and 1942 still appear on the assessment roll?

A. Yes, up to 1942.

Q. Don't you know they were ordered cancelled by the State Board of Tax Appeals?

A. Those, not to my knowledge.

Q. I can tell you this was and I think your counsel can tell you they were.

Mr. Chandless: What difference does it make?

Mr. Bain: That is the fact.

Mr. Chandless: They were on the books, they were there. He doesn't take them off.

Mr. Bain: It is admitted that the State Board of Tax [fol. 316] Appeals cancelled those taxes for 1941 and 1942? Isn't it a fact, otherwise I can prove it.

Mr. Chandless: The books show, which you know in 1942 and 1941 and 1940, they were on the books; whether you get some judgment to take them off or not. He doesn't pretend to know that.

Mr. Bain: Then, I would like to know whether the assessments for 1940, 1941 and 1942 have been cancelled pursuant to the judgment of the State Board of Tax Appeals.

Mr. Chandless: You obtained the judgment from the county board?

Mr. Bain: In 1943 the county board sustained the assessments in 1941 and 1942 and the appeals were taken to the state board and then cancelled the assessments.

Mr. Chandless: What is your point?

Mr. Bain: I want to know, as the record stands now, according to the testimony of this witness, whether the assessments on the coal for 1940 and 1941 and 1942 are still on and appear on the books?

Mr. Chandless: Now, it is my impression that you obtained an order that relieves you from paying that assessment and he testified they weren't paid. It is my impres-

sion you got such an order, and whether you did or not, I think you did, and I will say that it is not material in this case.

Mr. Bain: The judgment of the State Board of Tax Appeals cancelled the assessment. I want to know whether they have been cancelled pursuant to that judgment.

[fol. 317] Mr. Chandless: Struck off the book?

Mr. Bain: Yes.

Mr. Chandless: They were not.

Mr. Bain: Or whether they still are being carried on the books of the township as uncollected revenue?

Mr. Chandless: If you have an order from the county or state board, they don't mark anything off the books. They file that order and then the auditor deducts that from uncollected taxes.

Mr. Bain: Am I to understand that there is still and appears of record a tax against the Pennsylvania Coal Company on that coal for 1940 and 1941 and 1942?

Mr. Chandless: It appears on the books. There may be filed with the tax collector a judgment of competent tribunal which relieves you of the obligation to pay it. I think there was such a judgment.

Mr. Bain: It is not relieving anybody from the burden of paying. It is a cancelation of assessment. The county board stated in 1943 that the coal was exempted from taxation.

Mr. Chandless: Your point is that the tax collector marked on the books "cancelled"?

Mr. Bain: Yes.

Mr. Chandless: It doesn't make any difference.

Mr. Bain: And it stands there as an uncollected revenue?

Mr. Chandless: It doesn't stand that way. All judgments are deducted from uncollected taxes. So, that you get a net balance of uncollected taxes. If you applied [fol. 318] for a tax search, those judgments are taken into consideration. So, undoubtedly, if you made a tax search it would show there was a lien reversed by the state or county board or the Supreme Court, as the case may be.

Mr. Bain: I think I ought to say——

Mr. Chandless: I don't think it makes any difference in this case here. I am not quibbling here. It was there and nobody changed those books.

Mr. Bain: I would like to know, I would like to know whether I must mandamus the township to cancel those taxes on those books.

Mr. Chandless: I can relieve you on that score. You don't have to worry about it the least bit. From the auditor's point of view they do not allow tax collectors to write in there "Cancelled." That would open the door for anything to happen. He must support that by a certified copy of the judgment, whether or not he made any pencil reference on that to the effect it was offset by the cost, I don't know.

Mr. Bain: Then, I understand you to say that the taxes on the coal in 1940, 1941 and 1942 and 1943 and 1944, one or more of those years, are still being carried on the township books as an uncollected tax, uncollected taxes.

Mr. Chandless: I say just the opposite.

Mr. Bain: They are being carried as uncollected taxes.

Mr. Chandless: I say that that is not so.

Mr. Bain: Which is the fact, they are or they are not?

[fol. 319] Mr. Chandless: Whenever any judgment comes through and no further appeal is taken, the auditor then deducts them from his uncollected taxes, his uncollected tax account.

Mr. Bain: And you tell me that that has been done?

Mr. Chandless: I presume the auditor does it. He is a competent auditor. I presume he does it. I take it that the officials of Saddle River Township, when they are supposed to do something, do do it.

Mr. Bain: The taxes on the whole, at the Coalburg plant for 1941, 1942 and 1943 and 1944 amounted to approximately six per cent of the total taxes raised in the township, didn't they?

The Witness: Offhand, I couldn't tell you that.

Q. And the tax rate, however, for the years 1939, 1940, 1941, 1942, 1943 and 1944 didn't vary by more than about forty-five cents a hundred?

A. I will have to look at the list. This tax list. What year was that?

Q. From 1939 to 1944. The maximum increase in the tax rate for any year was not in excess of forty-five cents a hundred in value?

A. Yes, forty-five cents is right.

Q. Do you know what the tax rate would have been if you

carried the taxes on the coal for 1940 to 1943, as uncollectible revenue?

A. I think that is a job for the auditor to figure out.

Mr. Chandless: I object.

Q. Now, the licensing ordinance. That is the ordinance for the licensing of warehouses or the business of carrying [fol. 320] on storage of goods for hire, that was passed in January of 1943, wasn't it?

A. Yes, sir.

Q. And the taxes for 1944 were levied after that ordinance was passed, isn't that correct?

A. That is right.

Q. And they were included in the assessments for 1944 and assessment on the coal stored in the Coalburg plant, wasn't it?

Mr. Chandless: I object.

A. Offhand I could not tell you. The auditor does that work.

Q. I thought you told me the assessments for 1944 were ordered off?

A. They are not on the book, none for 1943 and 1944.

Q. Do you know whether there was an assessment on the tax duplicate as reported by the county board to the township?

A. No.

Q. What do you mean that the 1944 assessment was ordered off by the county board?

A. It is not entered in the book. There is no assessment against the Coalburg for any personal tax on the coal for 1943 or 1944.

Q. You mean there is no such assessment now or there was such an assessment and taken off by the County board?

A. That I could not answer. That is for the auditors to do that. That is a job for them.

Q. Do you know whether there was an assessment on the coal for the year 1943?

A. The books don't show it.

Q. Do the books show there was an assessment and cancelled by a judgment of the county board?

A. Offhand I could not answer that.

[fol. 321] Q. You haven't got the books here?

A. I haven't got 1943 with me.

Q. Why didn't you bring them?

A. There was no assessment against the firm and I figured it wasn't needed.

Q. No assessment against the coal?

A. Not personal.

Q. I ask you to leave your testimony subject to correction on that because there was an assessment on the coal in 1943. The township sent out a tax bill on the coal in 1943 and that assessment was appealed to the county board of taxation and the county board of taxation, by its judgment, held the coal exempt from tax. I don't want you to get in wrong with your testimony.

Mr. Chandless: We concede, as far as those years go, they were held open until after the decision of the Court of Errors and Appeals and then subsequent thereto, if the 1943 assessment had been levied by the time the decision came along, then, it was there, and subsequently cancelled. This man doesn't pretend to be competent in those mechanics.

Mr. Bain: He did testify distinctly on his direct-examination that the coal at the Coalburg plant——

Mr. Chandless: If it was ordered by the county board, and you tell me that is so, why confuse the man?

Mr. Bain: I am trying to find out whether for the years 1943 and 1944 this witness knows whether there was an assessment actually made which was cancelled by the county board.

[fol. 322] The Witness: I say in 1943 the county board ordered the assessment off the books. There is no assessment in 1944.

Mr. Chandless: He wasn't there. You were.

Mr. Bain: All right. As long as we have the record straight, all right.

Q. The assessment on the coal, that is the assessed valuation on the coal for personal taxes, from 1940, from 1933 to 1942, both inclusive, was $193,600?

A. That is right.

Q. Do you know what the assessment was for 1943?

A. Offhand I couldn't tell you unless I had the book here.

Q. That is all.

By Mr. Chandless:

Q. Just so as to clear up one thing, there was some mention made by Mr. Minard with respect to the rendering plant. I understand what you refer to is the rendering plant, that it holds three business licenses, one from the Township Committee and two from the Board of Health.

Mr. Bain: Not by the township. Both of the ordinances I had before me were from the Board of Health.

Mr. Chandless: You put it in evidence yourself.

Mr. Bain: No, I did not.

Mr. Chandless: Sure, you did. You put two of them in.

Mr. Bain: I object to that. There is no ordinance I have been able to find nor has he produced it for a separate licensing by the Township Committee for either slaughter houses or rendering plants.

[fol. 323] Mr. Chandless: I think you did put it in there. So, there may be no question about it, I call your attention to Exhibit P-13 and ask you if it is not true whether the license fee for rendering plants, the license to be obtained from the Township Committee, is $500, is that correct?

The Witness: That is right.

Mr. Chandless: And it was changed by an amendment to the ordinance reducing it to $150.

Mr. Minard: That is exhibit marked P-14?

Mr. Chandless: Yes.

And that is the ordinance from the Township Committee?

The Witness: Yes, sir.

Mr. Chandless: And that means that originally they paid $500 to the Township Committee and then they paid another $500 to the Board of Health for two licenses from the Board of Health?

The Witness: That is right.

Mr. Chandless: And now they paid a $150 to the Township Committee and $350 to the Board of Health for two licenses from that board?

The Witness: That is right.

By Mr. Bain:

Q. Now, Mr. Chandless has just shown you the published notice of the ordinance which was passed in March of 1934, hasn't he?

A. That is not the ordinance. That is the published notice of it.

Mr. Chandless: You put it in evidence.

Mr. Minard: It is conceded that that is the form in which it was passed.

[fol. 324] Q. Did the Board of Health in 1934 pass an ordinance for the licensing of slaughter houses and rendering plants and the Township Committee in the same month and at the same time also pass them?

A. Yes.

Q. So you had two separate licenses, one by the Township Committee and one by the Board of Health, covering the same business?

Mr. Chandless. Yes.

Mr. Bain: I want to make sure of that.

Mr. Chandless: We have it on the record so that everybody understands it.

Q. That is all.

Mr. Chandless: I have one more question of the previous witness. We want to offer in evidence the zoning map as distinguished from the whole ordinance.

Mr. Bain: When was that adopted?

Mr. Chandless: That was the one you questioned the witness about with respect to that, or Mr. Minard did. That is the zoning map of the Township of Saddle River, is that correct?

The Witness: Yes, sir.

Mr. Chandless: I will offer it in evidence.

(Exhibit D-2).

Frank E. Harley, a witness called on behalf of the respondent, being first duly sworn, testified as follows:

Direct-examination.

By Mr. Chandless:

Q. Mr. Harley, you are the township engineer of the Township of Saddle River, is that right?

A. Yes, sir.

[fol. 325] Q. At my request, Mr. Harley, did you compute the area on Exhibit P-1?

A. Yes, that is correct.

Q. Did you compute the square foot area of the storage piles that appear on that exhibit?

A. Yes, I did.

Mr. Minard: Let us understand what is meant by storage piles, referring to that map. You didn't compute the area of the assessment block 106-D?

The Witness: I computed the area of the actual ground occupied by the coal as it was stored.

Mr. Minard: You mean the coal floors?

The Witness: The coal floors. No, not the coal floors, just the actual area within the circles shown as between what is noted in the map as floor D. There are two circles here, 120 foot radius. That is within the floors, exclusive of the areas outside of the circles.

Q. The areas of the assessment, you didn't compute that?

A. No.

Q. The floor, as floor space?

A. Yes, occupied by the coal.

Q. And those are floors marked "D," rather, the circles in about "C" and "D" and "B" and north, which is between here. Those broken lines, circles, is that what you include?

A. Yes, sir, and with approximate calculations.

By Mr. Chandless:

Q. What did you find to be the ground area of each one of these circles which indicate coal piles?

A. Roughly, there was around forty-five thousand.

[fol. 326] Q. Forty-five thousand of what?

A. Square feet of ground area occupied by the coal piles.

Q. How many piles altogether appear on Exhibit P-1?

A. There are fourteen.

Q. That gives you a total area for the storage of coal of how much?

A. Of about 630,000 square feet.

Q. And——

Mr. Bain: Pardon me. Those broken line circles north of the track are larger than the circles south of the track?

The Witness: Yes. I made a little allowance, I said approximate areas. I figured those approximately.

Mr. Bain: Then, you treated them as having the same areas as the coal floors?

The Witness: In other words, they are perhaps a little larger on account of the method of piling and it would be about or average up.

By Mr. Chandless:

Q. Now, that would be the total square footage of storage space under Exhibit P-1 in the event that the plant was filled to capacity, is that correct?

A. Yes, sir, the actual area used to store coal.

Q. And naturally if the plant was only up to fifty per cent of capacity the ground area would be proportionately reduced, isn't that correct?

A. Not necessarily. If those piles were fifty per cent, the ground area would be the same amount. If they used half the number of piles, yes.

Q. In other words, they had seven tons of coal and they put it into seven piles?

A. Yes, then it would be half of the area.

[fol. 327] Q. Instead of the fourteen?

A. Yes, sir, half of the area.

Q. Well, now, did you compute what the cost per ton, what the cost per ton of coal would be under the license ordinance involved in this case?

Mr. Minard: Based on his computation of 630,000 square feet.

The Witness: That is right, also on several other basis.

Q. Now, you also computed the area on the basis of 1,198,500 square feet as appearing on Exhibit marked P-2, isn't that correct?

Mr. Minard: P-1, isn't it?

The witness: No. P-2.

A. Yes, it is.

Q. And that square foot area has reference to the square feet of land used for storage plant purposes, is that right?

A. That is what the exhibit states.

Q. That is what the exhibit states?

A. Yes, sir.

Q. You also computed it on the basis of a total of, the amount of square feet used for storage space or storage plant and also railroad tracks, didn't you?

A. That is right.

Mr. Minard: How many square feet?

Q. That is the addition of what two items on Exhibit P-2?

Mr. Minard: How many square feet?

A. One question at a time. The fourth column is the occupancy of the railroad tracks, 4,000, no, 462,300 square feet, and storage plant 1,198,500 square feet. The sum [fol. 328] of these two gives me 1,660,850 square feet.

Q. Now, Mr. Harley, will you tell us what the rate per ton of coal would be?

Mr. Minard: Let's get the figures first. What is the license fee he uses?

A. I am using a license fee of——

Mr. Minard: What does it amount to on the 600,000 square feet?

Q. You computed it that way?

Mr. Minard: He had to have that figure in order to compute the rate per ton.

Mr. Chandless: Wait until we show you.

Q. (Last question repeated by stenographer as follows: Now, Mr. Harley, will you tell us what the rate per ton of coal would be if the plant had a capacity of 400,000 tons?)

Mr. Minard: That is objected to.

Q. Based on the three computations of area which you have just referred to.

Mr. Minard: I object on the ground that the witness hasn't stated any computation of the amount of coal that could be stored on those areas.

Q. You answer the question. Have you got a set of figures?

A. Yes, I have.

Q. I ask you to compute it on the basis of 400,000 tons in storage.

A. That is correct.

Q. I asked you to compute it on the basis of 360,000 in storage?

A. Yes.

[fol. 329] Q. And I asked you to base it on 138,109 tons in storage as appears by Exhibit P-10.

A. Yes.

Q. Have you prepared those computations?

A. I have, sir.

Q. And that is the computation indicating on this?

A. Yes, it is.

Mr. Chandless: I offer it in evidence. I have given you a copy of it.

Mr. Minard: I think we will read it in the record. Don't mark it.

Q. Will you give us your computations?

A. Yes. We have the 400,000 tons using a storage space of 630,000 square feet on the basis of three-quarters cent per square foot area occupied, the amount in the ordinance would give us .0120 cents.

Q. Per ton?

A. Per net ton.

Q. All right. Proceed.

A. On th basis of the occupancy, the storage plant given in this Exhibit P-2 is $1,198,500. It is two and a quarter cents.

Q. Capacity?

A. 400,000 tons.

Mr. Minard: That is on Exhibit 2.

The Witness: Supposing I state them.

Q. Yes.

A. On the basis of 400,000 tons in storage, the storage space 1,660,800 square feet being the total amount of area shown on Exhibit P-2 as storage plant and occupancy and railroad tracks and gives us a rate of .0267 cents per ton. Proceeding on the basis of 350,000 tons in storage, 630,000 square feet gives us .0155 cents per net ton. On the basis of 1,198,500 square feet, it gives the rate of .0257 and 350,000 tons in storage gives us 1,660,850 square feet, rate .0303 cents per ton. On the basis of the amount of storage given in this one case of 138,108——

[fol. 330] Q. Referring to what?

A. To Exhibit P-10. I gave you the three figures on the same basis, using in each case 630,000 square feet, and that would be .0342 cents, on the basis of the same amount of coal, 1,198,500 square feet at .0651 cents per net ton. The same tons in storage 132,000—1,660,850 square feet, would be .0802 cents per ton.

Q. Now, Mr. Harley, did you compute what would be the taxes on coal at Coalberg if the same was taxed as personal property?

Mr. Minard: I object to that on the ground that this witness would have to fix the value and he is not qualified to do so.

Mr. Chandless: I am going to proceed with it. The question is did he compute it and his answer is yes.

Q. Now, did you compute it on the basis of the prices set out in Exhibit D-1?

A. Well, I would like to see what Exhibit D-1 is.

Q. That is the card.

A. Yes, that is Pattison & Bowns. That is Pattison & Bowns schedule. Yes, I used these prices in here.

Q. And what tax rate did you use?

A. I used the tax rate of four cents per ton which I——

Q. No. By four cents a ton you mean a federal tax?

A. Yes.

Q. What local tax rate did you use in arriving at a computation, what the tax rate would be on this coal as personal property?

Mr. Minard: For what year?

A. I used an average rate of $5.85 per hundred dollars.

Q. That appeared to you to be the average tax rate valuation of Saddle River Township over a period of what?

A. Four or five years.

[fol. 331] Q. Will you give us what you ascertained would be the personal property tax per ton on grate, egg, stove and chestnut coal if taxed on that basis?

Mr. Minard: The question is objected to on the ground that it is not within the qualifications of this witness. Do I understand that your object is to show that the object of this ordinance was to obtain the equivalent in taxes or what had been set aside by the court, is that the object?

Mr. Chandless: My object is to show that this license fee, which you claim to be unreasonable, would impose a tax on this coal, only a very small proportion of what they would pay for personal property taxes, or anybody else would pay if they didn't use the device of a warehouse. My object is to show that this ordinance, which is for revenue purposes, would raise in revenue and impose upon the prosecutors in this case a burden far less than the burden which they themselves carried for years.

Mr. Minard: Are you willing to answer my question yes or no?

Mr. Chandless: You asked me what I was trying to do. You know.

Mr. Minard: Will you answer my question? Why are you unwilling to answer my question yes or no, one way or the other?

Mr. Chandless: I am submitting to the Court what I consider to be conclusive evidence that this ordinance is very reasonable.

Mr. Minard: You are not willing to answer my question [fol. 332] that this is a tax in lieu of the tax which the court set aside. All right, O. K. Give it up.

Mr. Chandless: The ordinance says on its face it is a revenue ordinance.

Mr. Minard: We grant that. I would like to know whether the witness is basing his answer on a tonnage of 400,000 tons, what tonnage he is basing it on.

Mr. Chandless: It doesn't make any difference.

Mr. Minard: In other words, to get the tax rate you have to, in order to get a valuation, you have to know the number of tons and price per ton. The question isn't proper unless we have some information as to the tonnage on which the witness based his answer and the price per ton.

Mr. Chandless: It wouldn't make any difference. All this witness is doing is multiplying it by five. Eighty-five.

Mr. Minard: Is that all he is doing?

Mr. Chandless: Yes.

Mr. Minard: Then, I object to the statement that his answer would be the amount any tax on the coal.

Mr. Chandless: That is what the tax would be.

Mr. Minard: No. It is a mere arithmetical calculation by the witness.

Mr. Chandless: The question was, I will repeat it.

Q. What would the tax be on egg, grate, stove and chestnut coal at Coalburg in Saddle River Township at the average tax rate of 5.85 on the basis of a ton?

[fol. 333] Mr. Minard: I make the same objection as before to the former question.

Q. Answer the question.

A. The price $9.94 a net ton at the rate specified 5.85—would be 58 cents per ton for grate, egg, stove and chestnut coal.

Q. In other words, if this coal was subject to personal property taxes at a rate of 5.85, that is what each ton of grate, egg, stove and chestnut coal would be?

Mr. Minard: I object. It is not within the qualifications of the witness. I think you must concede that he cannot state what the taxes would be.

Q. Answer the question.

Mr. Chandless: He answered or testified that that is the average tax rate. He testified that he used prices set for it in Pattison & Bowns price list, which has already been put in evidence.

Mr. Minard: Then he has multiplied a certain tonnage.

Mr. Chandless: Tonnage has nothing to do with it. It has nothing to do.

Mr. Minard: How does he get the tax?

Mr. Chandless: He gets the price per ton and applies the rate to it.

Mr. Minard: This is supposed to be a statement of taxes per ton.

The Witness: Yes, sir.

Mr. Minard: In order, in other words, if they had a hundred thousand tons, what would the tax rate be?

[fol. 334] The Witness: A hundred times 58 cents.

Mr. Minard: Based upon the application of a tax rate to the price of a ton of coal stated in a circular sent out to coal dealers?

The Witness: That is right.

Mr. Chandless: Based on the average rate as paid by the prosecutors in this case over a period of a great many years.

Mr. Minard: I object to that statement because there is no proof of it.

Mr. Chandless: I submit that the record shows that Mr. Belli testified that the taxes on this coal from 1928 on——

Mr. Minard: If you take the taxes actually levied for any particular year, that is something else. That is not what you are doing.

Mr. Chandless: Will you give us the figures?

The Witness: Pea coal based at $8.40 a ton would be 49 cents a ton. Buckwheat $6.80 a ton would be 40 cents a ton. Rice at $5.98 a ton at Coalburg would result in 35 cents. Barley $4.90 a ton would result in a tax rate of 29 cents a net ton at Coalburg.

Q. Now, the values you place on that coal, according to those figures which you have just given us were arrived at how?

A. Taking the circular which is marked D-1, the Pittston Coal Company, November 24, 1943, taken at their published price list, the discount plus the federal tax and plus the freight rate from the mines to Coalburg.

Q. Now, at my request, did you check some of the holders of liquor licenses in Saddle River Township and compute [fol. 335] the area used for business purposes by those licensees?

A. I did.

Q. Will you tell us what ones you checked and what square footage you found used for business purposes?

Mr. Minard: I object to that as being irrelevant, unless he shows that the ordinance licenses them by the square foot and he cannot show that. I object unless he shows that the license was fixed according to a square footage basis.

Q. Answer the question.

A. I checked four taverns in Saddle River Township.

Q. Did they appear to be average taverns?

Mr. Minard: What is an average tavern? Tell us what that is.

A. I checked four and I came within a few square feet. The Shack on Saddle River Road has 778 square feet. Paley's Tavern on Paley Avenue and Saddle River Road had an area of 840 feet. De Rosa's tavern was rather smaller. That only had an area of 567 square feet. That is President and Fifth Street. Then, there is Ed's Tavern

on Market Street which had an area of 700 square feet. That would give us an average area used for tavern purposes between 700 and 800 square feet, a rough calculation of 800 square feet.

Q. Did you then compute the square foot charge for licensing purposes under the liquor license ordinance?

A. I can do it, on the basis of 800 square feet, which we will assume as an average.

Q. The license fee being $250?

A. That is correct.

[fol. 336] Q. What do you find is the rate per square foot?

A. Approximately 32 cents per square foot.

Q. Actually it will be about 31⅓ cents per square foot?

A. Yes, that is correct.

Q. Now, did you check the rendering plant that is licensed by the Township Committee and under the two licenses of the Board of Health?

A. I did.

Q. How many square feet did you find used for their business purposes?

A. The total of the square foot area 6,544 square feet.

Mr. Minard: Repeat that.

The Witness: 6,544 square feet.

Q. Did you compute the charge per square foot using the license fee of $500?

A. Yes. On the basis of $500 license fee for both buildings it would be about 7.6 cents per square foot.

Q. Did you make a computation as to carnivals, carnival license fees as referred to in Exhibit marked P-13?

A. May I see that?

Q. Yes.

A. Yes. There are two types of carnivals. One is an annual carnival.

Q. Did you compute that?

A. Yes. That would be an average, the annual carnival from what I could learn from the Township Committee, it was put in for the purpose of having a kind of a perpetual outdoor show with little merry-go-rounds. It is mostly for children. That fee was $500.

Q. What was the area involved there?

A. 100 by 100 contemplating using, that would be on a basis of 5 cents a square foot. Now, on the outdoor carnival for one week or less there was a fee of $100.

Q. Now, did you compute that on an annual basis, the square foot rate?

[fol. 337] Mr. Minard: Which one?

A. There are two types. First there is an annual basis for a small carnival of more or less permanent nature.

Mr. Minard: Is that of any particular size?

The Witness: That is approximately 100 by 100 that would be required.

Mr. Minard: Is there a place set aside for that type of thing in the township?

The Witness: An application was made to place this little children's carnival on a site about 100 by 100.

Q. By carnival you mean a merry-go-round?

A. Yes, and amusements for children and the fee for that was to be $500 per year.

Q. Then, the weekly one, did you compute that?

A. From my observation of that type of carnival, they usually get them into a space of 200 by 200 which is slightly less than an acre.

Q. What rate would be the fee per week?

A. A quarter of a cent a foot.

Q. And a year?

A. It would be fifty times a quarter of a cent, or 13 cents a square foot per year.

Mr. Minard: 13 cents a square foot?

The Witness: Per year.

Mr. Minard: A year is $5,200?

The Witness: Yes, sir.

Mr. Chandless: I am just about finished.

The Witness: That was about all.

Q. You examined the locality known as Coalburg?

A. Yes.

[fol. 338] Q. You did?

A. Yes.

Q. Are you familiar with it?

A. Yes, sir.

Q. What have you got to say about the level of the land there as compared with the surrounding neighborhood?

A. I would rather put that in a different way. The tracks through this section are about five to six feet higher than the level of the land surrounding.

Mr. Minard: You mean the railroad tracks?

The Witness: Yes, five foot fill through there.

Q. Through the whole neighborhood?

A. Through the whole neighborhood.

Q. That is to prevent what?

A. To keep their railroad straight.

Mr. Minard: You don't mean in the plant?

The Witness: All the way through the section.

Mr. Minard: In the plant property?

The Witness: Yes, sir.

Mr. Minard: You are not talking about the main line of the railroad?

The Witness: They are both the same.

Mr. Minard: The tracks are five or six feet above the floor?

The Witness: Yes, sir. These tracks here shown on Exhibit P-1, these tracks are practically on the same level as the Susquehanna Railroad tracks. These down here are on a lower level, going over Saddle River Road you have an approach on each side. You have to come up six feet [fol. 339] to clear it or go over the tracks. In other words, the tracks are six feet higher than all your surrounding property.

Q. Referring to Exhibit P-1, I call your attention to a certain line that leads out of the property and ask you what that is, these certain lines, what are they?

A. They show generally that the topography of the adjoining neighborhood——

Q. What are they?

A. Well, you have a street over here.

Q. Any approximation indicated on that map?

A. Yes. There is a street here, Garden Street, and there is a pretty substantial size of brook underpassing Garden Street and Saddle River Road.

Q. And that leads from where to where?

A. It drains the area occupied by Coalburg and also drains the area north of Coalburg. The residence area north of Coalburg and the Saddle River Township.

Q. That indicates what to you, the Coalburg property has what relationship to the area between it and the Saddle River, is it higher or lower?

A. Generally, in order to have that brook drain into Saddle River it has to be a little higher.

Q. And brooks do not run uphill?

A. No.

Q. Therefore, you know the Coalburg property is higher than the neighborhood which surrounds the Saddle River?

A. Slightly.

Q. Enough so a natural brook runs off?

A. It is a natural brook; it is a brook.

Mr. Minard: Does that brook run through the Coalburg property?

The Witness: Yes. However, they have converted to suit their own purposes. You have a drainage area there to the south.

[fol. 340] Q. Now, I ask you, Mr. Harley, when the Township of Saddle River laid out the maps of this area——

A. We have the tax map which shows some development adjacent to Coalburg.

Q. That has been brought up to what date?

A. It has been brought up to date. In other words, they were taken from the tax map sheets in my office which are kept right up to date within a month or two.

Q. This is the present lay-out of the neighborhood, is that right?

A. Yes, the Coalburg property and the adjoining houses.

Mr. Chandless: I will offer them in evidence.

(Exhibit D-3.)

A. (Witness continues answering.) All these squares here indicate the houses there, all through here.

Mr. Minard: It shows a lot of streets not on the ground.

The Witness: It shows some, what we call paper streets, and also shows some physical streets.

Mr. Chandless: I will explain that to you.

Mr. Minard: This is not a development map.

The Witness: No. This is the tax assessment map.

Mr. Minard: That is, it shows the lots and blocks for the purpose of assessment.

The Witness: That is right.

Mr. Minard: Even where the blocks are not actually bounded by streets on the ground, by physical streets.

[fol. 341] The Witness: You will see wherever there are houses this tax map shows the houses in that vicinity.

Mr. Minard: And if it shows woods, no streets, what then?

The Witness: That is here.

Mr. Minard: It does show that situation?

The Witness: Yes, sir.

By Mr. Chandless:

Q. What does it mean when it shows a street on this map?

A. It means when you have a street on the map that has never been finished, I will say that it shows that developer went broke trying to develop it.

Q. Doesn't it indicate a map was filed, all filed maps must appear on assessing maps?

A. Yes, sir.

Q. And filed?

A. Yes.

Q. And the filed map is filed by the owner of the property indicating he proposes to develop his property in that particular form?

A. Yes.

Q. This layout here isn't devised by you as township engineer?

A. No. It is the layout devised by the owner of the property.

I might say that some of the paper streets and actual streets go back to long before I was born.

Q. One more question. Do you know whether or not they wash coal at the Coalburg plant?

A. There is every indication that they do for this reason. They have quite an extensive system of wooden troughs which drain into the ditches. I will be frank to say I have not actually witnessed them washing the coal, but they are there for the purpose. There is a system that can be used.

Mr. Minard: They all drain into filter beds?

[fol. 342] The Witness: No, they drain into the side ditches. I have noticed there isn't any great discoloration of the stream from your particles of coal.

Mr. Minard: It must be some filter then?

The Witness: The water isn't absolutely clear. It is a little turpid.

Cross-examination.

By Mr. Minard:

Q. Now, you have figured various areas as applicable under this ordinance. Do you know why the complainants in this case accuse these people of violating the ordinance by conducting a business on block 106-D, in the township?

A. No, I cannot. In other words, I notice you question the other witnesses to give an opinion. What I would say would be an opinion.

Q. Did you survey the plant prior to the enactment of the ordinance to get the area?

A. I took the data that I had which included the tax map data, aerial photographs and general information I had in my file and made up a composite map from my information.

Q. Did you report to the Township Committee any area subject of licensing?

A. I reported the area that I considered was used in connection with the storage of coal, which included tracks and so forth.

Q. Was that block 106-D?

A. Offhand, if you want me to refer to the tax map, I can answer that. Otherwise, I cannot.

Mr. Chandless: I object. The ordinance says that a license shall be taken for that area which is used for storage purposes. That would be dependent upon what you [fol. 343] say you want to use for storage purposes. If you want to use the area for seven piles, you make an application for that particular thing. This witness isn't competent to tell you how much you are going to use for storage purposes.

A. (Witness continues answering) I might tell you what you may use.

Mr. Chandless: He might tell you what he thinks you may use, but that wouldn't be binding upon the municipality as far as the complaint in this case goes. You know, Mr. Minard, that the reference to that particular lot is a matter of description, just the same as you might describe an assault and battery charge, say, having occurred at 240 Main Street. You wouldn't mean all over the property.

Mr. Minard: You don't punish assault and battery charges by three-quarters of a cent per square foot.

Q. Will you tell me how much area you reported to the Township Committee when you made the investigation prior to the enactment of this ordinance?

A. I think I have those records with me. I would not guarantee, though. I will look through and see. As I recall it, it was roughly about a million and a half square feet.

Q. I see, all right.

A. That I considered was used in the entire processing of storage of coal.

Q. Did you attempt to adopt the assessment as the place or premises where the business was conducted?

A. No.

[fol. 344] Mr. Chandless: I object. He had nothing to do with it. It was up to the Township Committee.

Mr. Minard: All right.

Q. Was that for the purpose of determining how much revenue the ordinance would bring?

A. I would not say so.

Mr. Chandless: I object.

Q. What was the purpose of it?

A. To find out what was the area of their operations. I am not the policy maker.

Q. We understand that. That is perfectly superfluous. You went there to measure a given area. Did you have instructions what area to include, what you were to get?

A. I was told to get in my opinion the area that was used for coal handling purposes.

Q. That was to be your opinion?

A. Yes, sir.

Q. Somebody else's opinion might have been different from that?

A. It might be. All these things are subject to differences of opinion.

Q. All right. You did not make a description of the property used for the plant purposes, did you?

A. No, I did not. Nor was there any occasion for me to do it.

Q. Well, that was one question I didn't ask you. You merely reported the number of square feet which in your opinion constituted the plant, is that right?

A. That is correct.

Q. You didn't give any description of the area by metes and bounds?

A. No, I did not.

Q. You understand, I suppose, that in various years different amounts of coal was stored there? You understand that?

[fol. 345] A. Yes, I remember I have seen practically every one of those piles piled up to the top.

Q. How long ago?

A. Well, I wouldn't want to say. I have traveled up and down the Susquehanna Railroad a number of years. In fact, I can remember when I was a very young boy and I was fascinated by the big piles of coal.

Q. You see, I cannot allow your statement go unless we fix the time for it.

Mr. Chandless: A lifetime.

Q. How long ago was it you saw all the coal piles filled?

A. I wouldn't be able to say.

Q. Was it ten years ago?

A. It might have been ten years ago or twenty years ago.

Mr. Chandless: I object.

Mr. Minard: All right.

Q. Now, then, you know that the amount of coal handled at Coalburg has diminshed over a great many years on account of competition of fuel oil?

A. I am not in the coal business.

Mr. Chandless: I object.

Q. Do you know that of your own knowledge that fuel oil has increased in use and coal has decreased in use?

Mr. Chandless: I object.

A. I am not in the coal business.

Q. Well, do you know that?

Mr. Chandless: How can he tell?

A. I can only tell you from my own experience. I now use oil instead of coal.

[fol. 346] Q. You know a great many other people have done the same thing?

A. Yes, sir.

Q. And during the past five years, how often have you been to the Coalburg plant?

A. Oh, I wouldn't know offhand, possibly, directly to the plant, possibly four or five times and I have passed it in that same period perhaps a hundred times.

Q. To what extent was it occupied the period I have mentioned during the past four or five years when you saw it?

Mr. Chandless: I object. He can't answer that. Do you want speculations or guesses?

Q. Can you answer my question?

A. I cannot. I haven't paid too much attention.

Q. Do you know of any time when there was 400,000 tons of coal there?

Mr. Chandless: I object. He has not testified there was.

Mr. Minard: He computed on that basis.

Mr. Chandless: You, in your pleadings said so.

Mr. Minard: No.

Q. Do you know of any time when there was 400,000 tons of coal there?

Mr. Chandless: He doesn't know.

A. I know there is a capacity of 400,000.

Q. Was there any time you have seen that during the last five or ten years, full to capacity?

A. As I say, I haven't paid too much attention to the amount of coal in there. I have no interest in that.

[fol. 347] Q. Do you know of any time when there was 400,000 tons of coal in there?

A. No, I don't.

Q. Do you know of any time when there was 350,000 tons of coal in there?

A. Well, I have seen, as I say, in the years gone by, I have seen that pretty well filled.

Q. When you say the last five years, do you know of any time when there was 350,000 tons of coal there?

A. I don't.

Q. Do you know of any time within the last five years when there was 138,000 tons of coal there?

A. By reading some of your exhibits and I presume they are correct. It is marked there.

Q. And that says that during a certain calendar year, namely 1941, 138,000 tons of coal was put in storage, throughout the year, but you don't know how much coal was there during any time during that year?

A. No.

Q. You computed on 138,000 tons of coal—didn't you compute on 1943 corresponding figures?

A. For one reason. I didn't consider those average years because of the coal strike and the trouble John Lewis caused.

Q. That is the reason?

A. Because it was subnormal years.

Q. Why didn't you use 1942?

A. For the same reason.

Q. You mean the same John L. Lewis coal strike in 1942?

A. The same general trouble in the coal industry.

Q. Upon what basis or information did you decide on the amount of coal put in throughout 1941 that constituted an average?

Mr. Chandless: I object.

Mr. Minard: Wait a minute. He said he used an average. [fol. 348] Mr. Chandless: Just a minute. I object on the ground that the witness' testimony on direct-examination was that pursuant to my instructions he made these computations on the basis of 400,000 tons and 138,900 tons. I take the responsibility of showing that those are material statements of quantities, 400,000 tons because in your pleadings, as I say, the capacity cited is 400,000 tons.

Mr. Minard: I have not said so.

Mr. Chandless: And 350,000 tons because your witnesses testified the capacity was that and 138,109 tons because in your exhibit you refer to that being the amount there.

Mr. Minard No, the exhibit doesn't show that that was there. Anyway, all right.

Mr. Chandless: This witness was not offered to show that these quantities were there.

Q. Did you use the 138,109 tons in 1942 as an average for computation purposes?

A. Simply for taking a certain year, on that basis, as on Mr. Chandless' request.

Q. You realize that that amount of coal wasn't in the storage plant at any one time?

A. There was a certain amount going through.

Q. Yes, there is a certain amount going through on the railroad, a year, but the amount going through a year wouldn't represent the amount of coal there is today.

A. Yes.

Q. Couldn't you answer that question?

A. Repeat your question.

Q. Because a certain quantity of coal passed through [fol. 349] Hackensack on the railroad during the twelve months of a given year, that wouldn't mean that there was that amount of coal in Hackensack on any one day, would it?

A. No.

Q. Did you undertake to determine, of your own volition, some fair basis of computation to determine the rate, the cost per ton of this license fee and so on which you gave us or did you simply do what Mr. Chandless told you?

A. At Mr. Chandless' request.

Q. He specified the area?

A. No, he didn't.

Q. Well, who did?

A. I did.

Q. Why did you select particular areas?

A. Because it was occupied by the operations.

Q. Which of these coal piles had coal in it when you looked at it?

A. There was more there than now.

Q. When did you look at it?

A. Oh, I would say possibly two years ago.

Q. You haven't seen it since?

A. Yes.

Q. When?

A. Last Sunday.

Q. How many coal piles last Sunday were occupied, how many of the coal floors were occupied?

Mr. Chandless: I object on the ground that this witness wasn't offered for the purpose of observation or testimony as to anything he observed. He, at my request, furnished certain computations based on your own exhibit. The thing you put in yourself. He computed that. I don't care what his opinion may be with relation to this plant, whether the fee is low or high. That is none of his concern, none of his business. We offered him for the purpose of, as an engineer, computing certain figures for us. That is all he is here for.

[fol. 350] Mr. Minard: If you are through padding the record, I will go ahead with my examination.

Q. How many coal piles were piled when you were there last Sunday on the coal floors?

A. Two on the railroad and in the rear some were piled up.

Q. Then, there were three piles?

A. I would say perhaps, I have forgotten how many in here. I know there was coal here and there.

Q. How high were the piles?

A. Well, I didn't make an estimate how high they were.

Q. You don't know how many or how much coal was in there?

A. It wasn't my intention to find out.

Q. You didn't want to know how much coal was actually there?

A. I had no reason to.

Q. Answer yes or no.

A. I had no occasion to measure up the coal.

Q. Well, you didn't know how much coal was there?

A. I saw no reason why.

Q. Did it make any difference to you how much coal was there?

A. No.

Q. All right. That is your answer. You could have given it a long time ago.

Q. Now, when you computed the cost per ton, of a license fee computed on the basis of certain areas, you included—

wait a minute—strike that out. When you used the track area of 462,350 square feet, you included all the tracks used by the Susquehanna Railroad whether devoted to the plant use or not?

A. I used the figures in your own record.

Q. And that exhibit marked P-2 shows that the New York, Susquehanna and Western Railroad Company uses exclusively 188,555 square feet of the track area which isn't [fol. 351] used for the plant at all. That exhibit shows that?

A. I don't know.

Q. You used the exhibit, didn't you?

A. I simply used certain figures.

Q. Why didn't you use all the figures?

A. Well, that job would be endless then.

Q. You think so?

A. Yes.

Q. Well, did you know that only 107,240 square feet of track area was used for plant purposes?

A. At what time?

Q. At any time. Did you know that? Did you know that?

A. You fellows ought to know it.

Q. Well, do you know it?

A. No, I haven't checked it.

Q. Did you examine or were you shown exhibit P-9 which specifies the use of those tracks, were you shown that exhibit?

A. I haven't seen that number.

Q. Didn't you know, did you know that the New York, Susquehanna & Western Railroad Company used all of the tracks in that plant exclusively for railroad purposes, did you know that?

A. I would not be in a position to know that.

Q. Then, your answer is you didn't know that.

A. No.

Q. When you looked at it last Sunday was it full of freight cars, the yard?

A. There was quite a few coal cars there.

Q. And were there any tank cars there?

A. I didn't notice any.

Q. Did you know that that yard is used constantly by the New York, Susquehanna & Western Railroad for the assembly of tank cars and coal cars and freight to supply the [fol. 352] convoys leaving New York at intervals?

A. I know the western part of the yard is.

Q. Do you know that the entire yard is used for railroad purposes so that coal cars cannot get to the coal piles at all, did you know that?

A. No.

Q. When you used the 462,000 square feet of track in your computation, you included all of the railroad tracks as well as those used by the coal plant, didn't you?

A. Which is available for coal storage.

Q. Well listen. Can't you answer a question without hedging or ad lib-ing? I will repeat the question. Did you or didn't you, and answer yes or no.

A. I used the 462,000 square feet in my estimate.

Q. And that is all the tracks in the yard?

A. I don't know.

Q. You don't know?

A. No.

Q. Now, in reaching these figures per ton, cents per ton, of the license fee, you have assumed certain quantities of coal without knowing whether those quantities of coal were ever in the yard at any one time, haven't you? Can you answer yes or no?

Mr. Chandless: That is what he testified to.

Q. Is that right?

A. I figured the potential capacity.

Q. Only capacity, is that right?

A. Yes.

Q. Then, if at any time the amount of coal that you used, the hypothetical tonnage that you used wasn't there, then, your figures would not be correct, would they?

A. No.

Q. All right. Did you have anything, did you have any figures to show how many tons of coal are handled in that plant when you made this computation?

[fol. 353] A. I simply had the figures that we used in the former hearing.

Q. In other words, you had the one figure of the amount of coal that was passed into the plant during the twelve months of 1941, is that right?

Mr. Chandless: Which was a sub-normal year.

Mr. Minard: Wait a minute.

Q. Is that right?

A. I used the figures in there. I don't know whether it is 1941 or 1942 or not.

Q. Listen. You used this figure?

A. That is right.

Q. And that is for the year 1941, isn't it?

A. According to that, yes.

Q. That shows the number of tons that went into the plant during the entire calendar year, doesn't it?

A. That is right.

Q. And if they went out of the plant a week or a month after they went in, that didn't make any difference in your computation, did it?

A. No.

Q. O. K.

(Colloquy off the record.)

Q. Now, I understood you to say that you didn't make any computations at all on the basis of the coal that went in or out during 1942 or 1943?

A. That is correct.

Q. But you used 1941 because you thought that it was a normal year?

A. I wouldn't say it was a normal year, no. I would say it was much less than a normal year.

Q. What is a normal year, what tonnage would you call a normal year?

A. I am not in the coal business.

Q. You said it was much less than a normal year. I want to know the basis for that opinion. What is or was a normal [fol. 354] year?

A. I say I am not in the coal business.

Q. Well, you are free with opinions, but when you come to justify them, you are not in the coal business.

Mr. Chandless: You are arguing with the witness.

Mr. Minard: I know, but the witness is intelligent enough to know.

Mr. Chandless: You know what he did, he did the same as your witnesses did, at my instructions he took a set of figures and computed a mathematical result from those figures. If they haven't any basis, that is my hard luck or misfortune.

Q. You say 1941 was a sub-normal year in the handling of coal.

Mr. Chandless: I told him that.

Q. Do you know of your own knowledge whether it is or not?

A. Well,——

Mr. Chandless: You don't pretend to know anything about the coal business, do you?

Mr. Minard: Now, wait a minute.

Q. You are an expert when you want to be, but not on cross-examination. Did you assume, for the purpose of computing the cents per ton, that the amount of coal put into the plant in 1941 was a normal basis?

A. No, I didn't.

Q. Then, when you said that you didn't use 1942 and 1943 figures because they weren't normal, there was interference by strikes, you didn't mean that, did you?

A. I know there was a shortage then.

[fol. 355] Q. How much of a shortage was there?

A. I am not in the coal business.

Q. How much of a shortage was there?

A. I don't know.

Q. Would you know there was a shortage?

A. I know a number of places try to get coal.

Q. Did you know that there was a shortage?

A. You tried to get coal last year.

Q. Did you know that there was a shortage?

A. From my own experience.

Q. And you know there was a shortage of coal at the Coalburg plant?

Mr. Chandless: I told you there was, didn't I?

The Witness: Yes, I did.

Mr. Chandless: All right. Your figures are based on what I told you.

The Witness: That is right.

Q. In other words, you made no independent investigation to determine the basis of any of these computations, is that right?

A. That is right.

Q. So that these are merely, you merely took a pencil and figured up certain things that Mr. Chandless told you to figure up, is that right?

A. Correct.

Q. They didn't need to qualify you as an expert, then. I have an adding machine down in the office that can do all that. Now, you computed certain tax values of coal at certain prices. Of course, that would be assessing it on a hundred percentage basis, wouldn't it?

A. Yes, sir.

Q. Is that the way all property in Saddle River is assessed?

A. I am not an assessor.

Q. I know you are not, but there are so many things you are not and I wonder what you are.

[fol. 356] Mr. Chandless: He is an engineer and a very good one at that.

Q. You assume that all property is assessed at a hundred per cent of value, didn't you?

A. I did, I did in this.

Q. Do you know whether that is true or not?

A. I am not an assessor.

Q. Do you know whether or not it is true, whether it is true or not?

A. I don't know.

Q. All right, that is the answer. Now, when you computed that cost per ton, on the assessment of coal, you computed a tax on a federal tax of four cents a ton, didn't you?

A. Yes, sir.

Q. Is that the customary way of determining the current value of a thing to include the taxes on it?

A. According to my income tax, yes.

Q. Well, do you have any coal in your income?

A. No.

Q. Now, then, do you think that it is a correct way to compute the value of an article for tax purposes to add the tax itself to the value, the right thing for taxing purposes?

A. That is the actual cost of the article.

Q. Well, can you answer my question?

A. No.

Q. Well, all right. Now, this tax that you computed at $5.85, you included the freight rate on the coal?

A. I did.

Q. So you taxed the freight trate at $5.85 per hundred, is that right?

A. Correct.

Q. Well, is it customary to tax railroad transportation locally here in this township of Saddle River, Saddle River Township?

A. I don't see why it isn't.

Q. Did you ever read the Constitution of the United States?

A. I did.

Q. Do you know that goods in transportation cannot be taxed in inter-state commerce?

[fol. 357] Mr. Chandless: He didn't say interstate commerce. He said when an object is worth $2 in Pennsylvania and costs $2 in New Jersey, you wouldn't bring it here unless it was worth $4, and if you had to pay a federal tax and you paid a federal tax, you wouldn't bring it unless you got $4.04 on it. You and I can argue those things before the court. This witness isn't competent to determine what the true value is. I submit that the transportation costs are an element of value. We all know from common knowledge, that it teaches us that Pattison & Bowns wouldn't bring a ton of coal down from Pennsylvania and pay a federal tax on it unless when it got here it was worth the total of what was paid for it and the freight and federal taxes and more. They are not in business to serve the public.

Mr. Minard: When you get through making a speech we will go on with the examination.

Mr. Chandless: Just to understand each other——

Mr. Minard: I understand you perfectly.

Q. Now, did you know that when the coal was taxed, in years past, for a great many years back, it was taxed, assessed?

A. I don't know the exact figures.

Q. Now, how much would it have been assessed for at your computation in 1943?

A. I don't know.

Q. You don't know whether it would be more or less than that?

A. No.

[fol. 358] Q. In other words, to know the amount you would have to know how much coal was there?

A. Yes.

Q. And you didn't know that?

A. No.

Q. Now, you computed certain areas of saloons and you know that a saloon is licensed under the police power and not for revenue, don't you?

A. I am not a lawyer, so I cannot say how it is licensed. I know there is a license.

Q. The answer is that you don't know?

A. No.

Q. Now, then, how many floors had the Shack?

A. One floor.

Q. How many floors did Paley's have?

A. One floor.

Q. And how many floors had DeRosa?

A. There were living rooms upstairs, I believe.

Q. And how much was the total floor area of the two floors?

A. I didn't figure that.

Q. And Ed's place, did that have more than one floor?

A. No, one floor.

Q. They are licensed, all licensed under the liquor law, aren't they?

A. That is my understanding.

Q. Now, those are within the classes that are commonly known as nuisance licenses, aren't they?

Mr. Chandless: I object. He is not competent to answer that.

A. I don't know.

Q. You don't know.

A. No.

Mr. Chandless: For your information, the majority of people in Saddle River consider your coal plant more of a nuisance.

Mr. Minard: Mr. Chandless, if you could shut off the gas leakage you have, we could get somewhere.

[fol. 359] Q. You know that liquor licenses are in a special class?

A. I know there is some special provision for it.

Q. Now, you wouldn't compare a liquor business with a grocery business, would you, from the standpoint of public health and welfare?

A. Not necessarily.

Q. And you wouldn't compare the way a coal yard is conducted either, on the same basis, would you?

A. What kind of a coal yard?

Q. Any kind of a coal yard. You wouldn't compare a coal yard and a saloon on the same basis of public health and welfare, would you?

Mr. Chandless: What he wants to know is whether you would rather have a saloon or a coal yard.

Mr. Minard: Mr. Minard knows what he wants.

A. In my municipality we have all kinds of complaints about coal yards and about taverns too.

Q. Can you answer my question?

A. No.

Q. A rendering plant or a slaughter house is generally classified as a potential nuisance, isn't it?

A. Yes, sir.

Q. That is the reason why you have a high license on this rendering plant out here, isn't that right?

Mr. Chandless: I object. He is not competent to testify to that.

A. I don't know.

Q. Isn't that the reason there is a $500 license on that plant?

A. So I understand from the testimony.

[fol. 360] Q. You understand that that is because it is a potential nuisance?

A. I don't know why they put it on. I didn't happen to be in the township when it was put on.

Q. You have no idea why they have a high license on a slaughter house?

A. I imagine because there is a certain amount of inspection necessary.

Q. Your idea is then that the license fee ought to relate to the cost of inspection necessary for the licensed business, is that right?

Mr. Chandless: I object.

Q. Well, it was your suggestion. It wasn't mine. Can you answer the question?

A. No.

Q. All right. Now, on the carnival situation, the annual carnivals, you said that the license fee would represent five cents a square foot. Did you ever measure an annual carnival to see how much space they occupied?

A. No, I did not.

Q. Do you know how much space is occupied by any carnival that has ever existed in Saddle River Township or elsewhere?

A. I have seen carnivals there and by observations.

Q. When did you see the last carnival there?

A. I would say perhaps five years ago.

Q. That was an annual carnival?

A. No, that was a weekly carnival.

Q. Did you measure the area it occupied?

A. Not with a tape measure, no.

Q. Carnivals vary in sizes, don't they?

A. Yes, sir.

Q. Anywhere from a Gypsy fortune-telling tent to a Barnum & Bailey carnival?

A. I wouldn't call it a carnival.

Q. That is the way it is tested. According to your theory [fol. 361] it might be anything from the size of a fortune-teller's tent up to the size of a full-sized circus?

A. No, because they specify a circus as a different or certain fee.

Q. Then, the carnival, either an annual carnival or a weekly carnival, may occupy any area of ground?

A. It would occupy, but generally on these small carnivals they go about from town to town and they occupy an acre of ground.

Q. The ordinance doesn't limit them to any area?

A. No.

Q. So, the fellow who occupies one city block has to pay just as much as a man who occupies an acre of ground?

A. That is right.

Q. And it doesn't have anything to do with how much money they take in or anything of that sort?

A. No, apparently not.

Q. As an engineer, did you figure that a computation has any validity, that is, not based upon actual figures?

A. At times we make certain assumptions.

Q. Then, you always rely upon the result of your assumption?

A. Not necessarily.

Q. Have you ever observed the brook in the Coalburg plant when the water was high in Saddle River?

A. We had lots of complaints about it and worked with the mosquito commission on it.

Q. In fact, all these ditches are filled up when the river is flooded?

A. Yes, sir.

Q. So they are not sufficiently above the river level to drain off all stages of the water condition in Saddle River?

A. It depends upon the culvert conditions.

Q. Can you answer the question?

A. It depends upon the culvert condition. In other words, the culvert water must pass under certain culverts. The back-water depends upon how much debris and water collects.

[fol. 362] Q. Is the high water level in Saddle River above or below the bottom of these ditches?

A. I would say generally it is slightly, Saddle River is two or three feet lower than the bottom of these ditches.

Q. You mean at all times the ditches will drain out into the River?

A. Generally, yes.

Q. Have you ever seen them when they didn't drain out?

A. No.

Q. You never did?

A. No.

Q. Have you ever seen those ditches' backwater back up and cover Saddle River Road?

A. At certain places I have seen that condition.

Q. What is the comparable levels of mean high water in Saddle River as compared with the outlet of the brook that drains from the Coalburg plant?

A. I wouldn't be able to answer that without having taken some direct measurements with levels.

Q. This map you offered in evidence——

A. You mean the tax map?

Q. Yes. Can you tell us what streets on that map are paper streets and do not exist on the ground?

A. Yes. Gardon Street is an existing street.

Q. Between what streets is it?

A. It is between Saddle River Road and Coalburg. It is laid out and improved. You have Sterling Place from Saddle River Road over to the edge of Coalburg which is paved. You have Rochelle Parkway which isn't only paved but also curbed from Saddle River Road all the way over to Maple Street, and you get in here there are paper streets here.

Q. Read them into the record.

A. All of them?

Q. Yes. You started to give the improved streets. Then, everything else is paper streets.

A. Yes.

[fol. 363] Q. You have mentioned them.

A. Yes, the improved streets?

Q. Yes.

A. Yes.

Q. Now, confine yourself to this map, Rochelle Parkway is an improved street?

A. Yes.

Q. And those are the only actual streets there?

A. They are the only physical streets.

Q. That sheet is marked what?

A. That is the sheet showing the Coalburg plant.

Q. It shows the Coalburg plant?

A. Yes.

Q. Part of it?

A. Yes, sir.

Q. Has this map got a number?

A. Yes, No. 7.

Q. What is the next one showing the Coalburg plant?

A. Coalburg is over here on Platt Avenue.

Q. You are talking now about sheet No. 3?

A. That is Platt Avenue up to Chelsea Driveway and is a constructed street from Saddle River Road. Then there is Franklin Street, Ackerman Street, Catherine Street and Harrison and Market Street and Saddle River Road are all constructed streets.

Q. All right. Now, is there any more maps that affect the situation?

A. Yes, there is. Coalburg is relatively over here on the map.

Q. How far away from sheet No. 5?

A. We can match them up and see. They are the adjoining streets.

Q. All right.

Mr. Chandless: We will give you a composite map.

Q. Will your composite map show what part is from one sheet to another?

Mr. Chandless: It will be all on one sheet.

Mr. Minard: We have to identify these. He is stating the improved streets. All right.

[fol. 364] A. (Witness continues answering:) Here is Coalburg over here, and the following streets on here are improved.

Q. Referring now to what?

A. To sheet No. 5, Glen Road and McArthur Drive. It is from Glenn Road to this road here, Platt Avenue, from Glen Road to Welcome Road, and all of Welcome Road, and again Franklin Avenue, Ackerman Avenue, Catherine Avenue, Central Avenue, Harrison Avenue and they are all improved streets, having houses in them. This is all paper streets over here, so far.

Mr. Chandless: How about Henry Street?

The Witness: It is improved as well as Central Avenue.

Q. Is Market Street improved.

A. Oh, yes, sir. It is a state highway. These streets are improved here.

Mr. Chandless: In other words, there are streets that cross here, cross Market Street.

The Witness: Yes, these are all improved, yes.

Mr. Chandless: In other words, practically every street on that map is improved?

The Witness: Yes, with this exception, except from here over to there. That one is not improved.

Q. From Glenn Road?

A. Over to Platt Avenue it is not constructed.

Mr. Chandless: Going back to this one, so we get the record straight, you didn't mention Washington or Albany Streets.

[fol. 365] Mr. Minard: He mentioned that one.

The Witness: Washington and Albany Streets, facing this way, yes.

Q. Now, then, let me ask you how many of these blocks that are shown on this exhibit, the tax map, is divided up into building lots, are assessed at acreage on the tax map, on the records of the township?

A. Well, I would say it is my experience, I would say, from general experience, wherever there is a block and lot number shown here it is assessed by block numbers.

Mr. Chandless: That is a legal proposition. It must be. When they lay out a golf course, as a legal proposition——

Mr. Minard: Let us stick to this thing.

Q. Will you say that none of these blocks that are shown here, divided into lots, are assessed as acreage?

A. I will say they are all assessed as blocks and lots.

Q. Are you sure of that? Have you looked to see?

A. No, I haven't.

Q. Under oath, you won't want to say they are or not?

A. From time to time we have had transfers come through from Hackensack which the assessors referred to us and we had to give them the lot and block number under the transfer of the deed.

Q. That hasn't anything to do with my question.

A. As to the actual mechanics of the assessors, how they keep their records, I don't know.

Q. Now, also, to the north of the Coalburg plant, where you show lots and blocks, on assessment sheet No. 7, there is a considerable area of that occupied by woods, is it not?

A. By forests. No, I won't say so.

[fol. 366] Q. Well, have you been to see it, do you know?

A. I know the territory. There is brush there.

Q. No standing trees?

A. There are some, yes.

Q. When you say some, don't you know that a great part of this area back of the Coalburg plant is wooded land?

A. There is some wooded land around there, yes.

Q. You wouldn't say that the greater part of it is wooded land back of it?

A. It depends upon what your definition of wooded land there is.

Q. Do they go out hunting in it?

A. They go hunting in the brush.

Mr. Chandless: And you go hunting in open country too.

Mr. Minard: I suppose you can hunt anywheres in Saddle River Township.

A. (Witness continues answering:) I don't think it is so. I am not familiar with it.

Q. You have to get a license?

A. I don't know. I know you have to make a statement.

Q. Now, you say that all these lots and blocks showing on this tax map represent maps filed by developers, people who are getting ready to sell them as building lots, is that right?

A. In years gone by.

Q. But, you don't or couldn't tell us how many of those were actually developed?

A. Except those I have pointed out where the streets were improved.

Q. Those are the only ones?

A. The names of all these developments are right on the map. Here in this map here. There is the Klein Realty and Improvement Company. That is one case here. And then there are others.

[fol. 367] Q. Of course, the fact they are here is no indication of whether or not or to what extent the development has been carried out, is there?

A. Yes. In this particular case, in this particular tax map which is unusual, they do spot all the buildings and from this, by looking it over, you can see where the streets are probably improved.

Q. Wherever there is a house, it is an open street?

A. Yes, open to traffic.

Q. I meant, there is no indication by this map as to what extent these proposed developments were ever carried out, is there?

A. What do you mean?

Q. Could you tell by this map?

A. Yes, I could, very distinctly. I would take this particular map, there are a number of houses on this street and here on this street also. That is an indication it has been developed.

Q. That is the only indication you have that it has been developed?

A. Except from personal knowledge of some of the stuff, that I know about.

Q. And if there is a farm house anywheres in the neighborhood, is that on the map?

A. Generally, I believe so. I didn't prepare it.

Q. Let us look at Garden Street.

A. Here is a number of houses.

Q. Let us look at Garden Street, is there a farm shown on the corner of Saddle River Road and a barn in back of the house shown there?

A. On the southwest corner it indicates something. It could be a barn. However, it is pretty big for a garage.

Q. Well, it is.

Cross-examination.

By Mr. Bain:

Q. Mr. Harley, shortly prior to January of 1943, I think it was in the month of December, you were asked to ascer-[fol. 368] tain the area of the place at which the coal storage business was being carried on at Coalburg?

A. Yes, sir, that is correct.

Q. And you went down to the plant when, in December of 1942?

A. I wouldn't know without referring to my diary.

Q. It was before January, wasn't it?

A. Sometime in that neighborhood.

Q. And you examined the plant?

A. Yes.

Q. And you made some calculations of the area of the place at which the business was being conducted?

A. That is correct.

Q. Did you make several different calculations and arrive at several different results?

A. No. My mind is a little hazy on that. As I recall it I figured the area occupied by the coal storage operations as a certain amount.

Q. You stated, I think, roughly speaking, at a million and five hundred thousand square feet?

A. Yes, sir.

Q. Was it much more than that subsequently?

A. No. In fact, I recall the Coalburg testimony as giving a million and——

Q. Never mind the testimony. I am trying to find out what you did before this testimony was put in. At what figure did you finally arrive as the area of the place at which the business was being conducted?

A. I believe it was about 1,500,000.

Q. It wouldn't be fluctuation or a difference of 50,000 square feet, one way or the other?

A. I wouldn't say without going back to my original figures.

Q. You see a difference of 100,000 square feet might make a considerable difference.

A. It was much less than 100,000.

[fol. 369] Q. It might be a million, 500,000, and a few odd thousand?

A. In other words, figuring it from a practical standpoint——

Q. Were you informed at that time the township was contemplating passing an ordinance for licensing the business?

A. I knew in a general way they wanted something. Mr. Chandless asked me the figure as for the purpose of licensing, the licensing ordinance. I don't know. I presume.

Q. Weren't you told that it was for that purpose, what the purpose was for?

A. I wasn't interested or paid too much attention to it. We don't ask them what it was for.

Q. Was the licensing ordinance mentioned to you at that time?

Mr. Chandless: I object. Any conversation between Mr. Harley and myself wouldn't be binding on the township.

A. As I recall, I have even forgotten whether it was Mr. Chandless or Mr. Weller that asked me for the information.

Q. Regradless of who it was that asked you for the information, were you told or was it indicated to you that the township was then contemplating passing a licensing ordinance?

A. I knew there was something. I am simply an employee. I do not make it my business.

Q. You knew that something was contemplated about a licensing ordinance?

A. I presume it could be.

Q. You knew it was, didn't you?

A. I knew there was something they were doing.

Q. And that something was a licensing ordinance?

A. As it later revealed itself.

[fol. 370] Q. You knew at that time, that the township was contemplating passing a licensing ordinance and that

was the purpose of your ascertainment of the area of the place at which the coal storing business was done?

A. I knew they were figuring on something. I supplied figures to them.

Q. Wasn't that something a licensing ordinance?

Mr. Chandless: We made no secret about that.

Q. Wasn't that something a licensing ordinance?

A. I presume it was.

Q. You knew it was. I am asking you what your knowledge was. You knew.

Mr. Chandless: I object.

Q. Who asked you to go down and measure off the plant?

A. Mr. Chandless.

Q. Didn't he tell you what they were contemplating?

A. I don't recall.

Q. Would you say he didn't mention a licensing ordinance to you?

A. I didn't know what happened at that time. I knew there was an argument about Coalburg. I am furnishing information like that to attorneys all the time.

Q. Listen now. Will you say now that Mr. Chandless did not mention to you a township licensing ordinance to you at that time?

A. I don't recall.

Q. You won't say that he did not?

A. I wouldn't say he did.

Q. You just refuse to answer the question?

A. No. I don't know. I am supposed to swear to the truth. You want me to say something that I am not certain about.

[fol. 371] Q. I think we have enough on that.

Now, you made various calculations of what a license fee for the carrying on of the coal storage business at Coalburg would amount to per ton of coal?

A. Yes, sir.

Q. When did you first make those calculations?

A. Yesterday.

Q. At whose request?

A. At Mr. Chandless' request. We told you——

Q. Now, what amount of a total license fee did you take into consideration in making those calculations, if any?

A. I didn't take any. I simply took the present figure of three-quarters of a cent.

Q. And applied that to a ton of coal?

A. I applied it to a certain area, again based on an assumption of several areas which I stated before.

Q. And on an assumption to the total number of tons of coal that could be stored in that area?

A. Yes, sir.

Q. Did you ever make a precise arithmetical calculation of the number of tons of coal that could be stored on the area you mentioned?

A. I wouldn't say precisely. I made a rough calculation.

Q. Did you in making that calculation assume that the coal be stored in the area indicated by the small circles on the map?

A. Here are the maps?

Q. And the two large circles?

A. Yes, sir.

Q. But you didn't assume that coal would be stored on the large segment of a circle embracing each of the two small circles on the map?

A. No. I didn't figure that, just the actual conical piles.

Q. Don't you know, as a matter of fact, that the coal is stored not only on the small circles but within the area of the large segment?

[fol. 372] A. I know in loading they have a device that goes along and pulls the coal up through that circle.

Q. You didn't take that into account in making your calculation?

A. No, but the actual area occupied——

Q. You attempted to state some tax per ton of coal that wasn't based upon any actual value of the coal to your knowledge, was it?

A. It was simply based on the prices shown in that Pattison & Bowns circular.

Q. With respect to these liquor licenses, you took only the ground floor space, that is the floor space on the first floor?

A. Yes.

Q. In some instances the tavern had an attachment to it, a sort of a picnic ground attached to it, hadn't it?

A. In the one I measured, no.

Q. Did you measure up the one called the Shack?

A. The Shack?

Q. Yes, hasn't that got a picnic ground attached to it?

A. Yes, but that isn't part of the tavern.

Q. Don't they sell liquor there on the picnic ground?

A. I don't think so. I have heard a number of times and Mr. Chandless mentioned to me that they must sell the liquor within the actual building.

Q. Don't they serve it on the picnic ground, isn't that what the picnic ground is for?

A. I don't know. I have never been there.

Q. But, you don't include the picnic ground?

A. No.

Q. It is attached to the tavern?

A. Yes, sir.

Q. How large is the picnic ground?

A. You are asking me to guess again.

Q. It is ten times the floor space of the tavern, isn't it?

A. Well, I don't know.

Q. Or more?

A. Yes.

[fol. 373] Q. Another one of the places has a drive-in service where you drive into a parking space and have your liquor taken out to you?

A. I don't think so.

Q. Are you sure?

A. I can't tell you by personal experience. I never heard of such a place.

Q. You didn't take that into account, if it is there?

A. No.

Q. You won't say there isn't that there, that there is none?

A. I can't tell.

Q. Don't you know Saddle River pretty well?

A. Yes, sir.

Q. Don't you know one of these taverns, whatever you want to call them, has a parking space attached and people park there and have drinks taken out to them?

A. I don't know.

Q. Now, I think you said that these taverns, with one exception, are one-story high?

A. Yes.

Q. And they have cellars underneath them?

A. I didn't investigate that. The two of them, I know haven't.

Q. Isn't it customary to have a cellar in those places where they store keg beer?

A. Not necessarily. I have seen a lot that haven't got a cellar.

Q. You know these haven't?

A. I know two of them haven't.

Q. How many of them have?

A. I haven't made a census of all the taverns in Saddle River.

Q. You don't know?

A. No.

Q. You didn't include cellars for storage purposes?

A. No.

Q. Or any of the ground around the place?

A. No.

Q. Do you know whether the license covers the whole place, the land and buildings?

A. My understanding is and I am only speculating, it is [fol. 374] my opinion, of what I heard at the different meetings in different, in different townships, is that a license only covers a certain specified part of the building where the actual bar is.

Q. It doesn't cover the ground?

A. Not to my knowledge.

Q. You won't say that it doesn't?

A. I think it would have to be a special license for it.

Q. You don't know?

A. No.

Q. Now, Rochelle Park adjoins Saddle River?

A. Yes, sir.

Q. And Rochelle Park immediately adjoining has four or five feet, is four or five feet higher than Saddle River Township, isn't that so?

A. There are various levels.

Q. What is the elevation of the railroad track embankment above ground, above level, through the Coalburg ground?

A. Five or six feet.

Q. And that is to keep the track on a grade with the level with the track at Rochelle Park?

A. I presume so.

Q. Rochelle Park adjoining the portion of Saddle River covered by the Coalburg plant is about five feet lower than the adjoining part of Rochelle Park?

A. That is true, at the one particular point. You are making, however, a general statement.

Q. I am taking the part of the township covered by the Coalburg plant as about five feet below the level of the adjoining land in Rochelle Park, isn't that correct?

A. I won't say so. If you want me to qualify that, I would be glad to.

Q. How?

A. I would first have to know the grade of the railroad tracks going from Coalburg across Rochelle Park.

[fol. 375] Q. Didn't you say heretofore that the railroad embankment was for the purpose of maintaining a grade?

A. Yes, a minimum grade. That doesn't say there isn't a drop in those tracks. We may have a drop of so much for every hundred feet.

Q. Don't you know that the Coalburg plant is about five feet below the level of the adjoining land on the Rochelle Park side?

A. I wouldn't like to make that statement without taking actual measurements of the elevation.

Q. You wouldn't like to make the statement as to the exact difference?

A. Yes, sir.

Q. But, generally, you say that is the fact?

A. Generally, within a foot or two.

Q. Now, doesn't the first street in Rochelle Park beyond the Coalburg plant across the railroad at grade?

A. The first street?

Q. Yes, in Rochelle Park beyond the Coalburg plant.

A. That is correct.

Q. It crosses the railroad at grade?

A. Yes, sir.

Q. Then, you come down into the Coalburg plant and you find the embankment five or six feet high?

Q. How far from the street in Rochelle Park that crosses the railroad at grade, does the embankment begin?

A. I did not get the question.

Q. How far from the street in Rochelle Park that crosses the railroad at grade, does the embankment begin?

A. Well, again, you are asking me to guess.

Q. Approximately.

A. You drop down for a matter of three or four hundred feet.

Q. And the railroad track is on the embankment across the entire Coalburg plant, isn't it?

A. It is at the east end. And as it goes towards the west end it begins to approach ground level.

[fol. 376] Q. It doesn't until it gets beyond the plant?

A. Yes.

Q. And the brook runs through the Coalburg plant?

A. Yes, sir.

Q. Do not those things indicate to you that the spot where the Coalburg plant is located is the low spot of the territory?

A. It indicates that you have a drainage area through there and it also indicates that we have some poor drainage through Coalburg because I have had a number of complaints from the mosquito commission about the cross pipes, the culverts coming out of Coalburg being rather high, which would tend to make the Coalburg lands appear swampy.

Q. How long have you lived in that vicinity?

A. About twelve or fifteen years.

Q. And do you know what the condition of the land was before the Coalburg plant was constructed?

A. No, I was pretty young when the plant was built.

By Mr. Chandless:

Q. Just one question. When you computed the area at 1,500,000 square feet, you included the tracks, didn't you?

A. I included the tracks that I considered were used for handling of the coal and the coal being stored.

Q. If you deduct those tracks from your computation, you would then have a computation of about a million square feet?

A. I wouldn't like to say without calculating it.

Q. Aren't the tracks about 450,000 square feet, as appears by the exhibit you refer to yourself?

A. That includes the main line tracks. I didn't include them. I said perhaps the figure would be 300,000 and 400,000.

[fol. 377] By Mr. Minard:

Q. Don't make any mistake. It doesn't include any track outside of the property line of the Coalburg plant.

Mr. Chandless: All right.

Q. So if the municipality determined, the township determined that the tracks wasn't a portion of the licensed premises, that would necessarily reduce the area to be licensed, wouldn't it?

A. Yes.

Mr. Minard: Who has the right to make that determination, Mr. Chandless?

Mr. Chandless: You have a right to make an application under the ordinance.

Mr. Minard: Who would make the determination for the purpose of making the licensing fee?

Mr. Chandless: You will find under section 1 or section 2, to make an application and ask for a license for a given area; you can ask for forty or fifty square feet, if you want it.

Mr. Minard: Who determines the licensing fee? Could the operator of the plant say that he wants a license fee for 100,000 feet?

Mr. Chandless: Yes.

Mr. Minard: Anything he asks for?

Mr. Chandless: Yes. If he uses more than that 100,000 feet he might be convicted before a recorder.

Mr. Minard: Of what?

Mr. Chandless: Of using premises unlicensed. It is just the same as saloon keeper who holds a license to operate a [fol. 378] tavern on the first floor or the front room of such an address. If he sells liquor in the back room, he is selling without a license and can be convicted of it. By the same token, if you get your license, for the area that you want it, and then you went and stored coal outside of that area, you then would come under proper proceedings and you would be convicted of violating the oridnance because you were storing coal in premises not licensed. So far as you extended beyond the area prescribed by the ordinance.

Mr. Minard: I see.

Q. You computed the license fee per ton on three different areas, didn't you?

A. Correct, yes.

Q. And you computed it on the area including the tracks?

A. That is correct.

Q. And you computed it on the area which prosecutors in this case set up as being used for storage purposes?

A. Yes, sir.

Q. Without the tracks?

A. That is right.

Q. Then, you computed it on the area which according to their Exhibit P-1 appears to be piles of coal, is that correct?

A. Yes.

Q. And you also computed it on the three bases of tonnage?

A. That is correct, yes.

Q. Tonnage, 400,000 capacity as given to you by me?

A. That is correct.

Q. And also 350,000 tons?

Q. And also on the tonnage that is set forth in the exhibit of the prosecutors, is that right?

A. Yes, that is correct.

Q. I think that is all.

[fol. 379] By Mr. Minard:

Q. But, you didn't compute the other area you found was the area of the place used for carrying on the business which you said was approximately 1,500,000 square feet. If you had you would have found the license fee was $10,250, wouldn't you?

A. Well, I would have to go through the arithmetical figuring.

Q. Assuming it might be correct?

A. Yes.

Q. You don't claim you have the right to determine what area is being used for storing purposes?

A. No. It is up to the people.

Q. You mean to say that it is within the discretion of the Township Committee to determine how much area is to be included in the license?

Mr. Chandless: I say it is up to the independent warehouse operator for the Pennsylvania Coal Company to fill out an application in writing saying what portion of the premises they want licensed and then, of course, if they violate their license they might be subject to a penalty.

Q. Now, you say that you reported, in your opinion, 1,500,000 square feet being used as the place or premises where the business is conducted, is that right?

A. That includes the track.

Q. That was what is reported to the Township Committee by you?

A. To Mr. Chandless.

Q. That was before the ordinance was passed?

A. I presume so. I don't know exactly when it was.

Q. When was it?

A. I don't know. I have my diary.

Q. You can refer to it.

A. Yes.

[fol. 380] Q. Was it before the ordinance was passed?

A. It was about the time. I presume it was before. I am not sure.

Q. It wouldn't have been any good if you didn't submit it before the ordinance was passed?

A. Not necessarily.

Q. Well, the purpose of the inquiry was for consideration of or in connection with the passage of an ordinance, wasn't it?

A. Presumably.

Q. Now, then, how much of that million and a half square feet was, that you chose, was occupied by track?

A. Roughly, as I say, I haven't analyzed it in that way, but if you want me to guess——

Q. No. You are testifying under oath and you are an engineer. Tell me how much of that area was occupied by tracks.

A. I will say 350,000 square feet.

Q. And by what process did you determine which of the total area tracks on the property was used for the storage business?

A. I simply took the area from the files and on the basis of that used that.

Q. I know, but how did you choose among the tracks to determine which of them you would include?

A. I assumed there were two main line tracks of the Susquehanna Railroad. I figured from here north on a triangle.

Q. You are familiar enough with a railroad to know what a main line track is?

A. Yes. It is these right here. Yes, these two here, on the map. They keep these two tracks clear for back and forth movements with their streamliners and their other traffic.

Q. Which traffic? Show me on Exhibit P-1, which tracks you include?

A. I excluded the two tracks to the north side, in other words, I figured up to about here.

[fol. 381] Q. The Coalburg plant is over here, isn't it?

A. Yes.

Q. In other words, you included one, two, and three of the Susquehanna Railroad tracks that lie outside, that lie inside of the railroad line, the right of way of the line, not the Coalburg property at all. Do you see it here?

A. Yes.

Q. The three tracks that you included there are on the railroad right of way and not on the Coalburg plant?

A. That is correct, but I make this reservation first, that those tracks are used for storage of cars in the process of loading.

Q. Well, do you know that personally?

A. I have seen many coal cars right on this third track, as I went by on the Susquehanna Railroad train.

Q. All right. Did you include any tracks over here, like track Q and R?

A. I am only speaking from memory and I may be wrong. As I recall it is something like this and then along here. It was an irregular figure.

Q. You included all the tracks that were within this irregular piece that you used?

A. That is correct.

Q. Without regard to whether those were Susquehanna Railroad tracks or the plant tracks?

A. I went on the assumption those were used for the servicing of the coal storing.

Q. You got no information from anybody to verify that?

A. From observation.

Q. You didn't attempt to find out whether those loaded cars were in the Susquehanna Railroad yard awaiting the Weehawken dumper or the Edgewater dumper or whether they were storing coal?

A. I presumed they were being unloaded.

Q. You assumed that?

A. Yes, and I think at the time I saw some unloading.

[fol. 382] By Mr. Chandless:

Q. Your figures more or less agree with the engineer of the Pennsylvania Coal Company, do they not?

A. On the total figures I am somewhat less.

Q. Not an awful lot?

A. No, probably 100,000 less.

Q. You mean a combination of their figures?

A. What they call their track figures.

Q. You found the storage area as they computed it to be about the same?

Yes.

Q. You found the radius of the coal piles about the same?

A. Yes, sir.

Q. And the track area about the same?

A. Yes.

Q. So that we get back to the old proposition that you don't pretend to determine whether railroad tracks are used for storage or not, do you?

A. I am not interested in that, now.

Q. That is all.

Mr. Minard: I think that is all.

Mr. Chandless: That is all except I want to put in, I want to offer in evidence, as a single exhibit, the pleadings and docket entries in the United States District Court.

Mr. Minard: You mean the complaint?

Mr. Chandless: The complaint.

Mr. Minard: And the answer and the application?

Mr. Chandless: The complaint and intervening petition, and the preliminary restraining order. The order for intervention, the notice of motion for a preliminary injunction and the order denying the preliminary injunction and the docket entries.

Mr. Minard: Can't we abstract them in some way?

[fol. 383] Mr. Chandless: Not very well. We contend there is res adjudicata as to a material part of this case.

We will offer them as one exhibit, together with this. Now, one other offer I want to make, and then we will be through. This will be marked D-4. I want to offer certain testimony into the state of the case in the New Jersey Court of Errors and Appeals in the case of the Independent Warehouse, Inc. against the Township of Saddle River, as follows, page 39.

Mr. Minard: I object to it being used in this case unless the witness is examined and cross-examined.

Mr. Bain: I will make the same objection and on the further ground that the testimony offered is entirely immaterial and irrelevant and incompetent.

Mr. Chandless: I want to add to my statement that the testimony of Roy W. Radcliff, who is a witness in this case——

Mr. Minard: I object to it on the further ground that a part of the testimony of the record is incompetent unless you want the whole record of the testimony in.

Mr. Bain: I object to it on the further ground that Mr. Radcliff was produced, sworn and testified as a witness in the present proceeding, and would have been examined on that subject if you wanted to. Certainly, his testimony is entirely inadmissible now.

Mr. Chandless: Examination of it will develop he was examined in connection with it and he denied it and consequently this testimony is offered on the basis of contradiction.

[fol. 384] Mr. Minard: Anything he wasn't confronted with is inadmissible.

Mr. Chandless: Except on the basis of admission or contradiction which is always evidential.

Mr. Minard: What part do you want to include?

Mr. Chandless: Six or seven questions. I will read them here.

Mr. Minard: No, we will not allow you to read them here.

Mr. Chandless: Well, certainly, I am going to read them.

Mr. Minard: O. K. you read them, but we will go out. We are through.

Mr. Chandless: There is no question when a witness contradicts himself——

Mr. Bain: He has the right to be confronted with his testimony.

Mr. Minard: And you have to do it with him here.

Mr. Chandless: That is for us to argue.

Mr. Minard: No, it is the law.

Mr. Chandless: The following testimony of Roy W. Radcliff, on page 39 was submitted. Now, I would desire to have it appear on the record that these are read against protest of counsel.

Mr. Minard: And note on the record that it is read after counsel had left the room and the hearing has been closed.

Mr. Chandless: "I show you a letter from Pattison & Bowns Company and ask you whether or not that would refresh your recollection, (handing the witness a paper)"

and the answer is "No, I have nothing to do with him. I [fol. 385] don't know any thing about it. He was never connected with Pattison & Bowns. So, you say then that the prosecutor Pattison & Bowns had no authority to say that you people operated the plant, and the answer is I don't know anything about that. You can answer the question, you are an officer in the Pennsylvania Railroad Company, aren't you? and the answer is, That is right. Were Pattison & Bowns right or wrong when they wrote the tax collector this letter, and by Mr. Bain, as to what, and Mr. Chandless, as to the facts in the letter. The witness, what are the facts, Mr. Bain, and the answer, there are many facts stated, which one? Question: You examine the letter fully and tell us whether or not the facts set forth in that letter are correct, and the answer is, The facts are not correct. The Pennsylvania Coal Company wasn't operating the coal storage plant. Mr. Chandless, I would like to have this marked for identification, a paper referred to was received and marked Defendant's Exhibit 1 for Identification. And further, as to the same witness, at page 44 in the state of the case, the question, Did you know that Pattison & Bowns, the prosecutor in this action, wrote the tax collector and said that the Erie Railroad was taking over the plant. Answer, No, sir. Question, I show you a letter and ask you to refresh your recollection (handing the witness a paper). Mr. Minard, Identifying the letter by date. Mr. Chandless, Yes, I will have it marked. Answer, No, I don't know anything about that. [fol. 386] Mr. Bain, What is the date of that letter? Mr. Chandless, February 28, 1939. Mark it for identification, please. The paper referred to was marked Defendant's Exhibit 2 for Identification. Question. Do you know anything about the transaction at all? Answer, No, sir. Question, Do you know what they refer to when they wrote that letter? Answer, No, sir. Question, And also Exhibit D-1 and D-2, appearing on page 168, and 169 of the state of the case, being the letters referred to in the testimony in the above testimony."

[fol. 387] In New Jersey Supreme Court, October Term, 1944

No. 243/244

Independent Warehouses, Inc., a Corporation of the State of New York, and Pennsylvania Coal Company, a Corporation of the Commonwealth of Pennsylvania, and Erie Railroad Company, a Corporation of the State of New York, Intervening Parties, Prosecutors,

vs.

William Scheele, Recorder of the Township of Saddle River, and the Township of Saddle River, a Municipal Corporation of the State of New Jersey, Defendants

James Thompson, Prosecutor,

vs.

William Scheele, Recorder of the Township of Saddle River, and the Township of Saddle River, a Municipal Corporation of the State of New Jersey, Defendants

Argued October 4, 1944.

On Certiorari.

Before Justices Case, Bodine and Porter

For Prosecutors, Independent Warehouses, Inc. and James Thompson: Collins & Corbin; Robert J. Bain, of Counsel.

[fol. 388] For Prosecutors, Pennsylvania Coal Company and Erie Railroad Company: Hobart, Minard & Cooper; Duane E. Minard and G. Addison Hobart, of Counsel.

For the Defendants: Chandless, Weller & Kramer; Ralph W. Chandless, of Counsel.

Opinion—Filed January 19, 1945

The opinion of the Court was delivered by Porter, J.:

The writs of certiorari in these two cases bring before us for review the convictions of the prosecutors, Independent Warehouses, Inc. and James Thompson, its employee, for violation of Section I of an ordinance of the defendant

municipality on a charge of storing coal in a warehouse without having first obtained a license therefor. The ordinance in question provides for the licensing of the business of conducting the storage of personal property in a warehouse for hire and provides a penalty for violation of the said ordinance of imprisonment not exceeding ninety days or a fine not exceeding $200.00, or both. It is not denied that Independent Warehouses, Inc. was operating such a business on premises within the municipality at storage yards commonly called Coalberg and that Thompson was employed by it.

Independent Warehouses, Inc. is a corporation of New York, authorized to do business in New Jersey, and is engaged in storing goods for hire in ten states, including the warehouse at the Coalberg plant. It has operated this plant since June 20, 1939 in the storage of coal shipped in interstate commerce, for the benefit of and at the expense of Erie Railroad Company, and has shipped over that road exclusively as an in-transit facility for interstate shipments of coal.

[fol. 389] The Pennsylvania Coal Company is a corporation of Pennsylvania where it mines and sells anthracite coal. It holds title to the Coalberg property.

The Erie Railroad Company is a common carrier by railroad engaged in interstate commerce. Independent Warehouses, Inc. and Pennsylvania Coal Company are subsidiary corporations of Erie Railroad Company, the capital stock in both corporations being wholly owned by it. The Pennsylvania Coal Company and Erie Railroad Company were allowed to intervene in these proceedings. For the purpose of this litigation they have been, and will be, treated as one entity.

It is the practice of the prosecutors to store large quantities of anthracite coal in their yard at Coalberg in the defendant municipality. This yard has a capacity of storing about 400,000 tons of coal. It is convenient, if not indeed necessary, in marketing this coal and transporting it to the ultimate consignee to have a place of storage in which to accumulate it during the slack season, it not being possible or practical to deliver it directly from the mines at the peak season of its need by the consumer.

The proofs show that the Erie Railroad Company and Pennsylvania Coal Company have entered into a written

contract which provides that coal be shipped to and stored at Coalberg as a public facility for in-transit storage of coal under railroad tariffs under supervision of an Erie agent stationed at Coalberg, who collects freight and storage charges. The purpose of this arrangement is to provide a reserve supply of coal in large quantities produced in slack season and made available when needed in the winter season and to facilitate the financing of the pur-
[fol. 390] chase when desired by negotiation of warehouse receipts. It also appears that shippers of coal require these facilities; that it is necessary for carriers to provide them and that the Federal Act to Regulate Commerce provides that they be furnished by the carriers upon reasonable request of shippers. The fact with respect to this coal is that it is all owned by shippers or consignees and is shipped in interstate commerce from the mines in Pennsylvania to the ultimate destination in, or beyond, the New York metropolitan area with in-transit stopover privileges at Coalberg. None of this coal is sold at Coalberg. All of it is transported in and out of Coalberg by rail.

The controversy between these parties is over the right of the municipality to levy taxes on this coal. This yard is operated as a warehouse, and the taxation of the coal was set aside by this court and our opinion was affirmed by the Court of Errors and Appeals in *Pattison & Bowns, Inc.* v. *Saddle River Township* in 129 N. J. L. 135, aff'd 130 Id. 177. It was there held that coal stored in fenced in piles on an otherwise open tract of land equipped with machinery to handle the same is within the purview of R. S. 54:4-3.20 (exempting from taxation goods stored in warehouse.)

The attempt was then made to accomplish the same result by the adoption of the ordinance under which the prosecutors were convicted. This ordinance provides for the licensing of warehouses and fixing the license fee at ¾ of a cent per square foot of storage space. It appears that the space occupied by stored coal in this warehouse on that basis of licensing fees would bring in a revenue of about $11,000 a year, a sum approximately equivalent to the amount of the tax previously and unsuccessfully levied on the coal.

[fol. 391] The prosecutors raise many questions in their attack on the legality of this ordinance, the principal ones

being that the coal in reality is being taxed by the license fees, whereas it is exempt from taxation, because it is in warehouse as held by the *Pattison & Bowns* case, *supra;* also it is exempt from taxation because of its character as interstate commerce, also because of an unreasonable, arbitrary, capricious and discriminatory exercise of the licensing power.

We think these arguments are well made and that the ordinance is invalid. The prosecutors were engaged in a legitimate business, and it seems to us that the enactment of this ordinance was not a reasonable exercise of the police power for the promotion of public health, safety or general welfare but was an arbitrary attempt to raise revenue by discriminating against the business of prosecutors in the guise of license fees, and to thus secure from it a sum equivalent to taxes which would accrue, were the property not exempt. Compare *Resciniti* v. *Board of Commissioners of Belleville*, 117 N. J. L. 1; *Vassallo* v. *Orange*, 125 N. J. L. 419; *N. J. Good Humor, Inc.* v. *Bradley Beach*, 124 N. J. L. 162; *Gurland* v. *Kearny*, 128 N. J. L. 22; *Passaic* v. *Paterson Bill Posting Co.*, 72 N. J. L. 285; *O'Mealia Outdoor Advertising Co.* v. *Rutherford*, 128 N. J. L. 587; *The Great A. & P. Tea Co. Inc.* v. *Camden*, 122 N. J. L. 47; *Giant Tiger Corp.* v. *Camden*, 122 N. J. L. 240; *American Grocery Co.* v. *New Brunswick*, 124 N. J. L. 293, aff'd 126 Id. 367.

This business was exclusively interstate. It did not cease to be such by reason of the interruption of the shipment for storage purposes at Coalberg. The facts in the instant case distinguish it from *Lehigh & Wilkesbarre Coal* [fol. 392] *Co.* v. *Junction*, 75 N. J. L. 68, aff'd 75 Id. 922. In this case the taxation of coal was sustained because the coal was not subject to interstate commerce, as its destination was in this state where the tax was levied. It was stored here indefinitely until sold. In the instant case the purpose of the in-transit storage was for the economic reasons stated. Coalberg was not its destination. Its journey was simply interrupted for the purpose of storage and not for sale. It being a subject of interstate commerce, it is within the exclusive jurisdiction of Congress and the Interstate Commerce Commission. It may not be interfered with by the imposition of this license fee, which we think was upon the occupation or privilege of

carrying on such interstate commerce. Compare *Erie Railway Co.* v. *The State*, 31 N. J. L. 531; *West Jersey & Seashore Railroad Co.* v. *Lake & Risley Co.*, 105 N. J. L. 314; *United States* v. *Pennsylvania Railroad Co.*, 242 U. S. 208; *New Jersey Bell Telephone Co.* v. *State Board of Taxes & Assessments*, 280 U. S. 338.

For these reasons the ordinance will be set aside, and the convictions under review will be reversed.

[fol. 393] IN NEW JERSEY SUPREME COURT

Writ of Certiorari

INDEPENDENT-WAREHOUSES, INC., a Corporation of the State of New York, and Pennsylvania Coal Company, a Corporation of the Commonwealth of Pennsylvania, and Erie Railroad Company, a Corporation of the State of New York, Intervening Parties, Prosecutors,

vs.

WILLIAM SCHEELE, Recorder of the Township of Saddle River, and the Township of Saddle River, a Municipal Corporation of the State of New Jersey, Defendants

RULE REVERSING JUDGMENT OF THE RECORDER OF THE TOWNSHIP OF SADDLE RIVER, N. J. (INDEPENDENT WAREHOUSES, INC.)—Entered January 29, 1945.

The court, having inspected the transcript and proceedings of the Township of Saddle River, New Jersey, and William Scheele, Recorder of said Township, returned with the writ of certiorari in this cause and the reasons for reversing the judgment below, and heard the argument of counsel therein, and having duly considered the same, it is on the 29th day of January 1945.

Ordered that the judgment of the Recorder of the Township of Saddle River, be reversed, set aside, vacated and made for nothing holden.

Entered January 29, 1945.

[fol. 394] On Motion of Collins & Corbin, Attorneys of Prosecutor, Independent Warehouses, Inc.; Hobart, Minard & Cooper, Attorneys of Prosecutors; Pennsylvania Coal Company, Erie Railroad Company.

[fol. 395] IN NEW JERSEY SUPREME COURT

On Certiorari

INDEPENDENT WAREHOUSES, INC., a Corporation of the State of New York, and Pennsylvania Coal Company, a Corporation of the Commonwealth of Pennsylvania, and Erie Railroad Company, a Corporation of the State of New York, intervening parties, *Prosecutors-Appellees*,

vs.

WILLIAM SCHEELE, Recorder of the Township of Saddle River, and the Township of Saddle River, a Municipal Corporation of the State of New Jersey, Defendants-Appellants

NOTICE OF APPEAL. (INDEPENDENT WAREHOUSES, INC.)—Filed April 21, 1945

To: Collins & Corbin, Esqs., Attorneys for Independent Warehouses, Inc.; Hobart, Minard & Cooper, Esqs., Attorneys for Pennsylvania Coal Company and Erie Railroad Company.

SIRS:-

Take Notice that the Defendants-Appellants in the above-stated proceedings appeal from the whole of the judgment entered in this cause to the Court of Errors and Appeals.

Chandless, Weller & Kramer, Attorneys for Defendants-Appellants.

[fol. 396] ACKNOWLEDGMENT OF SERVICE—Filed April 21, 1945

[Title omitted]

Service of a copy of Notice of Appeal in the above entitled matter is hereby acknowledged this 7th day of April, 1945.

Collins & Corbin, Attorneys for Independent, Warehouses, Inc.

[fol. 397] ACKNOWLEDGMENT OF SERVICE—Filed April 21, 1945

[Title omitted]

Service of a copy of Notice of Appeal in the above entitled matter is hereby acknowledged this 9th day of April, 1945.

Hobart, Minard & Cooper, Attorneys for Pennsylvania Coal Company and Erie Railroad Company.

[fol. 398] IN NEW JERSEY COURT OF ERRORS AND APPEALS

On Certiorari

INDEPENDENT WAREHOUSES, INC., a Corporation of the State of New York, and Pennsylvania Coal Company, a Corporation of the Commonwealth of Pennsylvania, and Erie Railroad Company, a Corporation of the State of New York, intervening parties, Prosecutors-Appellees,

vs.

WILLIAM SCHEELE, Recorder of the Township of Saddle River, and the Township of Saddle River, a Municipal Corporation of the State of New Jersey, Defendants-Appellants

GROUNDS OF APPEAL. (INDEPENDENT WAREHOUSES, INC.)—Filed April 9, 1945

To: Collins & Corbin, Esqs., Attorneys for Independent Warehouses, Inc.; Hobart, Minard & Cooper, Esqs., Attorneys for Pennsylvania Coal Company and Erie Railroad Company.

SIRS:

The Defendants-Appellants state the following grounds of appeal:

The Supreme Court erred in its judgment setting aside the ordinance of the Township of Saddle River entitled "An Ordinance to Regulate and License the Business of

[fol. 399] the Storage of Personal Property in Warehouses Engaged in the Business of Storing Goods for Hire and the Place or Premises in or at Which Said Business is Conducted and Carried On, to Prescribe Fees for Such Licenses, and to Provide Penalties for the Violation of This Ordinance," and in reversing the convictions of Independent Warehouses, Inc. and James Thompson thereunder in the above entitled matter, in one or all of the following respects:

1. Because the Supreme Court erroneously found and determined that the enactment of the said ordinance was not a reasonable exercise of the police power for the promotion of the public health, safety or welfare but was an arbitrary attempt to raise revenue by discriminating against the business of Prosecutors in the guise of license fees and to thus secure from it a sum equivalent to the tax which would accrue were the property not exempt.

2. Because the Supreme Court erroneously found and determined that the business in which the Prosecutors were engaged in this cause was exclusively interstate.

3. Because the ordinance in question was lawfully enacted for the purpose of raising revenue by the imposition of license fees pursuant to R. S. 40:52-2.

4. Because the ordinance in question established a general classification and prescribed a license fee which was not prohibitory or confiscatory.

5. Because the question of whether the Prosecutors busi- [fol. 400] ness is within interstate commerce was *res adjudicata*.

6. Because the arrangement existing between Independent Warehouses, Inc., Pennsylvania Coal Company and Erie Railroad Company, relied on as rendering the nature of the business in question in this case, within interstate commerce was violative of the Federal Interstate Commerce Act, illegal and contrary to public policy.

Dated: April 6th, 1945.

Chandless, Weller & Kramer, Attorneys for Defendants-Appellants.

[fol. 401] ACKNOWLEDGMENT OF SERVICE—Filed April 9, 1945

[Title omitted]

Service of a copy of Grounds of Appeal in the above entitled matter is hereby acknowledged this 7th day of April, 1945.

Collins & Corbin, Attorneys for Independent Warehouses, Inc.

[fol. 402] ACKNOWLEDGMENT OF SERVICE—Filed April 9, 1945

[Title omitted]

Service of a copy of Grounds of Appeal in the above entitled matter is hereby acknowledged this 9th day of April, 1945.

Hobart, Minard & Cooper, Attorneys for Pennsylvania Coal Company and Erie Railroad Company.

[fol. 403] IN NEW JERSEY SUPREME COURT

On Writ of Certiorari

JAMES THOMPSON, Prosecutor,

vs.

WILLIAM SCHEELE, Recorder of the Township of Saddle River, and the Township of Saddle River, a Municipal Corporation of the State of New Jersey, Defendants

RULE FOR JUDGMENT (JAMES THOMPSON)—Entered January 29, 1945

The court having inspected the transcript and proceedings of the Township of Saddle River, New Jersey, and William Scheele, Recorder of said township, returned with the writ of certiorari in this cause and the reasons for error assigned, and heard the argument of counsel thereon, and considered the same;

It is on this 29th day of January, A. D. 1945, Ordered that the judgment of the said William Scheele, Recorder of the Township of Saddle River, New Jersey, be reversed, set aside, made void, and for nothing holden.

Entered January 29, A.D., 1945.

On Motion of Collins and Corbin, Attorneys of Prosecutor, James Thompson, Inc.

[fol. 404] IN NEW JERSEY SUPREME COURT

On Certiorari

JAMES THOMPSON, Prosecutor-Appellee,

vs.

WILLIAM SCHEELE, Recorder of the Township of Saddle River, and the Township of Saddle River, a Municipal Corporation of the State of New Jersey, Defendants-Appellants

NOTICE OF APPEAL (JAMES THOMPSON)—Filed August 27, 1945

To: Collins & Corbin, Esqs., Attorneys for Prosecutor-Appellee.

SIRS:

Take Notice that the Defendants-Appellants in the above-stated proceedings appeal from the whole of the judgment entered in this cause to the Court of Errors and Appeals.

Chandless, Weller & Kramer, Attorneys for Defendants-Appellants.

[fol. 405] ACKNOWLEDGMENT OF SERVICE—Filed April 7, 1945

[Title omitted]

Service of a copy of Notice of Appeal in the above entitled matter is hereby acknowledged this 7th day of April, 1945.

Collins & Corbin, Attorneys for Prosecutor-Appellee.

[fol. 406] IN NEW JERSEY COURT OF ERRORS AND APPEALS

On Certiorari

JAMES THOMPSON, Prosecutor-Appellee,

vs.

WILLIAM SCHEELE, Recorder of the Township of Saddle River, and the Township of Saddle River, a Municipal Corporation of the State of New Jersey, Defendants-Appellants

GROUNDS OF APPEAL (JAMES THOMPSON)—Filed August 27, 1945

To: Collins & Corbin, Esqs., Attorneys for Prosecutor-Appellee.

SIRS:

The Defendants-Appellants state the following grounds of appeal:

The Supreme Court erred in its judgment setting aside the ordinance of the Township of Saddle River entitled "An Ordinance to Regulate and License the Business of the Storage of Personal Property in Warehouses Engaged in the Business of Storing Goods for Hire and the Place or Premises in or at Which said Business is Conducted and Carried on, to Prescribe Fees for Such Licenses, and to Provide Penalties for the Violation of This Ordinance," and in reversing the convictions of Independent Warehouses, Inc. and James Thompson thereunder in the above entitled matter, in one or all of the following respects:

[fol. 407] 1. Because the Supreme Court erroneously found and determined that the enactment of the said ordinance was not a reasonable exercise of the police power for the promotion of the public health, safety or welfare but was an arbitrary attempt to raise revenue by discriminating against the business of Prosecutors in the guise of license fees and to thus secure from it a sum equivalent to the tax which would accrue were the property not exempt.

2. Because the Supreme Court erroneously found and determined that the business in which the Prosecutors were engaged in this cause was exclusively interstate.

3. Because the ordinance in question was lawfully enacted for the purpose of raising revenue by the imposition of license fees pursuant to R. S. 40:52-2.

4. Because the ordinance in question established a general classification and prescribed a license fee which was not prohibitory or confiscatory.

5. Because the question of whether the Prosecutors business is within interstate commerce was *res adjudicata*.

6. Because the arrangement existing between Independent Warehouses, Inc., Pennsylvania Coal Company and Erie Railroad Company relied on as rendering the nature of the business in question in this case, within interstate commerce was violative of the Federal Interstate Commerce Act, illegal and contrary to public policy.

Dated: April 6, 1945.

Chandless, Weller & Kramer, Attorneys for Defendants-Appellants.

[fol. 408] Acknowledgment of Service—Filed April 7, 1945

[Title omitted]

Service of a copy of Grounds of Appeal in the above entitled matter is hereby acknowledged this 7th day of April, 1945.

Collins & Corbin, Attorneys for Prosecutor-Appellee.

[fol. 409] In New Jersey Court of Errors and Appeals, October Term, 1945

Nos. 4/28

Independent Warehouses, Inc., Pennsylvania Coal Company, and Erie Railroad Company, Prosecutors-Respondents,

v.

William Scheele, Recorder of the Township of Saddle River, and Township of Saddle River, in the County of Bergen, Defendants-Appellants

James Thompson, Prosecutor-Respondent,

v.

William Scheele, Recorder of the Township of Saddle River, and Township of Saddle River, in the County of Bergen, Defendants-Appellants

Argued October 16, 1945; Decided January 31, 1946

On appeal from the Supreme Court, whose opinion is reported in 132 N. J. L. 390.

For the appellants: Chandless, Weller & Kramer; Ralph W. Chandless, of counsel.

For the respondents, Independent Warehouses, Inc. and James Thompson: Collins & Corbin.

For the respondents, Pennsylvania Coal Company and Erie Railroad Company: Hobart, Minard & Cooper. Robert J. Bain, Duane E. Minard and G. Addison Hobart, of counsel for respondents.

Opinion—Filed January 31, 1946

The opinion of the court was delivered by.

Heher, J.:

The challenged ordinance provides for the licensing of [fol. 410] "the business of the storage of personal property in a warehouse engaged in storing goods for hire," and "the place or premises" in which such business "is conducted or carried on," and levies, admittedly as a revenue measure, an "annual fee" to be computed "on the basis

or rate of three-quarters of a cent for each square foot of the total ground area of the place and premises" devoted to the business; and it is the insistence of respondents that, since this bylaw lays the license fee upon the "place or premises" in which the storage business is carried on, "measured by land areas," it is, in effect, an additional tax "upon the property," and that, at all events, it is in substance a tax laid upon the stored coal "in lieu of personal property taxes" that would be leviable thereon were it not for the exemption granted by R. S. 54:4-3.20, and thus a negation of that legislative policy. If "perishable goods" are stored upon the licensed premises, the licensee is under a duty to comply with all health regulations "required by any federal, state or municipal authority." He is also enjoined to observe all police and fire regulations laid down by the local "police and fire authorities." And there is provision for inspection of the premises by the local police, fire and health authorities, and a requirement that the storage of "any inflammable or combustible matter" thereon shall be immediately reported to the governing body. Respondents' business is within the exemption category. *Pattison & Bowns, Inc.* v. *Township of Saddle River*, 129 N. J. L. 135, affirmed 130 N. J. L. 177. We find these points to be devoid of substance.

The ordinance was enacted in the purported exercise of the power conferred by R. S. 40:52-1(g) and 40:52-2; and these provisions and sec. 54:4-3.20, supra, are mutually exclusive. The former involves to a license or privilege tax or excise levied for both revenue and regulation under the police power, while the latter section has reference to a property tax merely. The levies may coexist, if such be the legislative intention; and this is the case here. Sec. 54:4-3.20 plainly confines the exemption to property taxes, i. e. "personal property stored in a warehouse" of one "engaged in the business of storing goods for hire." [fol. 411] License is a means of regulating and taxing privileges and occupations and the use and disposal of property. The exactions thereby made do not take the category of an ad valorem property tax. License and property taxes cover separate and distinct areas of the local taxing power; and they have radically different attributes. *Jersey City* v. *Martin*, 126 N. J. L. 353. See, also, *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 41 S. Ct. 606, 65 L. Ed. 1139. The one is a tax upon the business of the warehouse-

man; the other is a direct tax upon the property of third persons stored in the warehouse. And the exercise of the latter power is confined by specific constitutional limitations which do not apply to the former. There is no suggestion of a legislative purpose to render the storage and warehouse business immune from the tax for revenue and regulation permissible under the cited licensing statute. The frame of the statutes is not consistent with the theory of an all-inclusive exemption from taxes of both classes. The contention contra necessarily proceeds upon the hypothesis that, prior to the adoption of the exemption statute, the ad valorem property tax was exclusive of all license taxes and excises; and this proposition is obviously untenable. The argument of competitive disadvantage is one to be addressed to the legislative forum.

But the exercise of the licensing power cannot exceed the bounds of reason. The law will not suffer confiscation and oppression under the guise of taxation. The quantum of the tax rests in sound discretion, guided by reason; and judicial intervention is justifiable only where there has been an abuse of the power. If the local legislative action is not clearly unreasonable or unduly oppressive or discriminatory, its policy is not a justiciable question. *The Great A. & P. Tea Co., Inc.* v. *Camden*, 122 N. J. L. 47; *Giant Tiger Corporation* v. *Camden*, 122 N. J. L. 240; *American Grocery Co.* v. *Board of Commissioners of New Brunswick*, 124 N. J. L. 293; *Durland* v. *Kearney*, 128 N. J. L. 22.

And we are clear that the taxes thus levied do not constitute a direct and undue burden upon and therefore a [fol. 412] regulation of interstate commerce in contravention of Article I, sec. VIII, cl. 3, of the Federal Constitution.

The regulation of foreign and interstate commerce is a subject within the exclusive jurisdiction of the Congress. This control embraces all the instrumentalities by which such commerce may be carried on. And, while a state possesses the power to tax property having a situs within its confines, whether employed in interstate commerce or not, it cannot impose a tax for the privilege of engaging in such commerce. *Helson* v. *Commonwealth of Kentucky*, 279 U. S. 245, 49 S. Ct. 279, 73 L. Ed. 683; *Sprout* v. *South Bend*, 277 U. S. 163, 48 S. Ct. 502, 72 L. Ed. 833; *McCall* v. *People of California*, 136 U. S. 104, 10 S. Ct. 881,

34 L. Ed. 391. But a tax for the privilege of exercising a corporate franchise within the state is not obnoxious to the commerce clause. A tax measured by net profits earned within the state is valid, even though these profits may have been derived in part, or indeed mainly, from interstate commerce. A franchise is deemed a part of the corporate property lawfully taxable in the state. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 41 S. Ct. 45, 65 L. Ed. 165; *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135; *Northwestern Mutual Life Ins. Co.* v. *Wisconsin*, 247 U. S. 132, 38 S. Ct. 444, 62 L. Ed. 1025. The tax levy here is not of the proscribed class.

The essential facts are not in dispute. The storage plant, commonly known as "Coalberg," is owned by the Pennsylvania Coal Company, a Pennsylvania corporation. It comprises 67¼ acres of land and buildings, tracks, chutes, hoppers, scales, machinery and equipment. The owner leased the yard in its entirety to Independent Warehouses, Inc., a New York corporation, at the nominal annual rental of one dollar. These Corporations are wholly owned subsidiaries of the Erie Railroad Company, a common carrier in interstate commerce; and under agreements between these parties, the plant is operated by the Pennsylvania Company "for the benefit and on behalf of," and at the sole expense of the Erie Company's trustees, "as a public service facility for shippers of prepared anthracite coal on Erie lines desiring storage space in accordance with and under the rates named in a certain tariff on file with the Interstate Commerce Commission and the Public Utilities Commission of the State of New Jersey, issued January 24, 1939," and any supplements thereto. The Erie's trustees agreed to maintain an agent at the yard authorized on their behalf to issue warehouse receipts for coal placed therein "for storage by shippers." The Penn-[fol. 413] sylvania Company undertook to remit to the trustees, monthly, the net operating surplus; and the trustees assumed the obligation of reimbursement for the net operating loss, if any. By express provision, "taxes" are includable in the "allowable items of expense chargeable against" operation and maintenance. By this arrangement, the Erie's trustees sought to avert the diversion of "shipments of coal * * * to other and competing lines on which facilities for coal storage are available."

The agreement with Independent Warehouses, Inc. recites that it was "the desire and for the interest" of the Pennsylvania Company that the lessee should conduct upon the premises the "general business of a warehouseman," and provides that the lessee shall devote the yard to such purposes, and shall furnish storage therein for "any and all types of coal * * * tendered to it for warehousing for the account or at the request of "the Pennsylvania Company (if there shall be available storage space) at the rate of two cents per ton, with a minimum annual charge of $600. There was also a provision for reimbursement of the lessee for its losses, costs and expenses not classable as "ordinary." By a supplemental agreement, the storage rate was reduced to one-half cent per ton, and the annual minimum charge to $500. The New York, *Susquehanna* and Western Railroad Company has certain contractual trackage rights at the yard, and the use of other facilities. Independent Warehouses, Inc. is engaged in the public warehouse business "at various places in nine states." For some 15 years prior to the agreement with the Pennsylvania Company, Independent had issued warehouse receipts for coal stored in this yard.

The Pennsylvania Company owns and operates anthracite coal mines in the State of Pennsylvania. Coal sold at the mines is, by contract with the purchaser, shipped in interstate commerce over the railroad of the Erie Company, and stored at the Coalburg yard until, at the shipper's direction, it is again conveyed by rail to its ultimate destination. For the intransit storage, including unloading, reloading, and the incidental services, the shipper pays to the carrier a tariff charge of 28¢ per ton. Free Storage is permissible for as long as two years. This storage is designed to meet seasonal deficiencies and shortages due to the excess of consumption over production, and to facilitate the financing of purchases through negotiable warehouse receipts, all of which, it is said, advance the general welfare as well as serve the particular interests of the mine operators, shippers and carriers. Erie's Coal [fol. 414] Freight Agent testified that, when because of seasonal conditions the supply exceeds the demand, "the operators bill" coal "to storage, to store it at an advantageous point for reshipment," that "the shipper *hasn't* enough orders to ship it out directly to destination;" that all the coal "is consigned to Coalburg, Rochelle Park, for

storage; billed at the regular tariff rates from the mine to the storage plant," and "it is held there awaiting orders from the consignee as to what is to happen to it." This course "relieves the car situtation," and it "also helps the operator to continue operating."

There is an established tariff charge for the storage; and the argument, in brief, is that through the "contract agencies" of the Pennsylvania Company, as owner of the plant, and Independent, as "a public warehouseman," the Erie Company "utilizes" this facility "solely to provide regular tariff in-transit services to its shippers for interstate shipments of coal from the Pennsylvania mines to ultimate destinations through, and beyond, Coalburg, with the facilities provided by the storage of the coal with a public warehouseman, as a regular transportation service facility over its line, pursuant to the demands of shippers;" and that the "tariff charges for this in-transit service are collected by the carriers directly from the shippers, and Erie, and participating carriers, bear the entire expense of the transit facilities."

But the coal is shipped to the purchaser or his consignee at Coalburg, Rochelle Park, and freight charges collected at the rate prescribed for transportation from the mines to that particular point, plus storage and unloading charges; and, when the coal is reshipped, there is, as we have seen, a new billing to the ultimate destination at the through interstate rate from the point or origin to the new destination, plus reloading charges, as a continuance of the original interstate movement," and the balance is paid by the shipper at Coalburg. The ultimate destination is not determined until the owner gives shipping instructions. Compare *Federal Compress & W. Co.* v. *McLean*, 291 U. S. 17, 54 S. Ct. 267, 78 L. Ed. 622.

Thus, the continuity of the carriage in interstate com- [fol. 415] merce is broken when the carried commodity is unloaded and stored at Coalburg for an indefinite period, subject to the owner's disposal, and thereby the coal becomes intermingled with the general mass of property having a situs within the State, and subject to the State's dominion and liable to taxation as such; and the stored coal retains that character and status until it is again shipped in interstate commerce. It does not become the subject of carriage in interstate commerce by reason of its con-

veyance by rail from Coalberg to other points in New Jersey.

The inquiry is whether the regulation lays an unconstitutional burden on interstate commerce, or a tax upon an independent local service, preliminary or subsequent to any interstate transportation. *People of New York, ex rel. Pennsylvania Railroad Co.* v. *Knight*, 102 U. S. 21, 24 S. Ct. 202, 48 L. Ed. 325; *McGoldrick* v. *Berwind-White Coal Min. Co.*, 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565. The question of times is one of remoteness and degree. The tax may be too remote and incidental to constitute a burden on the transaction of the commerce between the states. *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150, 17 S. Ct. 532, 41 L. Ed. 953. A tax that only indirectly affects the profits or returns from interstate commerce is not within the ban of the commerce clause. *United States Glue Co.* v. *Oak Creek, Supra.*

Property actually in transit in interstate commerce is exempt from local taxation. But if property be stored "for an indefinite time during such transit, at least for other than natural causes or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities." *Kelley* v. *Rhoads*, 188 U. S. 1, 23 S. Ct. 259, 47 L. Ed. 359. There, Mr. Justice Brown found that the earlier cases declared the principle to be that "while the property is at rest for an indefinite time awaiting transportation, or awaiting a sale at its place of destination or at an intermediate point, it is subject to taxation. But if it be actually in transit to another state, it becomes the subject of interstate commerce, and is exempt from local assessment." If there was a cessation of interstate commerce, the goods became subject to the jurisdiction of the state of their situs. Actual transit is the determinant. Here, movement in interstate commerce had ceased when the storage for an indefinite period began; and the coal then came within the [fol. 416] dominion and protection of the state. As in the case of *Susquehanna Coal Co.* v. *South Amboy*, 76 N. J. L. 412, affirmed 77 N. J. L. 796, there was something more than an incidental interruption of the continuity of the transportation through the state. On a bill in equity to restrain the collection of taxes levied in that case, the Federal Supreme Court expounded the principle that, even though the delay in interstate transportation was but temporary, if it was availed of for "a business purpose and

advantage," the commodity during that particular period "secured the protection of the state," and it was therefore subject to local taxation. *Susquehanna Coal Co.* v. *South Amboy*, 228 U. S. 665, 35 S. Ct. 712, 57 L. Ed. 1015.

The case of *Lehigh and Wilkes-Barre Coal Co.* v. *Junction*, 75 N. J. L. 68, affirmed Ibid, 922, is to the same effect. It does not matter that there the goods were owned by the carrier. That does not serve to vary the application of the principle. The determinative question is whether there was a cessation of interstate commerce when the goods were placed in storage at Coalberg for an indefinite period of time; and here it must be resolved in the affirmative. To borrow the language of Mr. Justice McKenna in the case of *General Oil Co.* v. *Crain*, 209 U. S. 211, 28 S. Ct. 475, 52 L. Ed. 754, the coal "required storage there,—the maintenance of the means of storage; of putting it in and taking it from storage." See, also, *State, Detwold and Cox, Pros.*, v. *Engle*, 34 N. J. L. 425; *State, Lehigh & W. Coal Co., Pros.*, v. *Carrigan*, 39 N. J. L. 35.

It is also urged that the Erie Company "and its agents" conduct "a common carrier public service facility for the transportation and in-transit storage of coal at Coalberg, under franchises and authority conferred" by the State of New Jersey, and it therefore cannot be required "to obtain a municipal license for the privilege of exercising its franchise."

Obviously, the franchise grant to the railroad company does not render immune from regulation and taxation under sec. 40:52-1(g) and 40:52-2, *supra*, a public warehouse business conducted by another, even though the operator be one of its corporate subsidiaries. The question is essentially [fol. 417] one of legislative intention; and there is no indication whatever of a purpose to exempt a public warehouse of this catgory from the operation of the cited statute, simply because the railroad company uses the facility for what it terms in transit storage after the movement in commerce has come to an end.

And we perceive no force to the contention that the license fee is arbitrary, unreasonable and prohibitory, and repugnant to Federal and State constitutional guaranties, in that (1) the license fee is measured on a square foot basis "without relation to volume of business conducted, tons of coal in storage, or gross net earnings of the opera-

tion;" (2) the fee is fixed "without relation to the value of the privilege of conducting the business," and is exorbitant; and (3) the fee is in *quantum* such as will "prevent the conduct of this interstate business within the municipality."

A tax on a public warehouse graduated according to storage capacity is familiar legislative practice. *Vide Federal Compress & W. Co.* v. *McLean, supra.* The license has reference only to the public warehouse business transacted at the warehouseman's established place of business within the State. *W. W. Cargill Co.* v. *Minnesota,* 180 U. S. 452, 21 S. Ct. 423, 45 L. Ed. 619. And under the ordinance in the case at hand, the warehouse corporation may protect itself against the inclusion of areas not devoted to storage in the calculation of the tax. There is a presumption that the tax is reasonable in amount; and the burden rests upon the challenger to overthrow that presumption. It has not been sustained here. There is not such disparity between the "value of the privilege" and the levy as would render the ordinance arbitrary and discriminatory. The parties are in disagreement as to the *quantum* of the tax upon the stored coal per ton. Based upon respondents' estimate of total plant area and capacity, the tax per ton would amount to 2-1/4¢, while the personal property tax would range between 29¢ and 58¢ per ton. From 1903 to 1940, when tax exemption was claimed under sec. 54:4-3.20, the plant was successfully managed notwithstanding that property taxes were paid on the stored coal in an amount not less than the current license tax.

And there is no merit in the contention that the municipality does not possess power under the cited [fol. 418] enabling act "to penalize an employee because his employer fails to comply with a licensing ordinance," and therefore the conviction of the individual respondent, Thompson, cannot be sustained.

Under the ordinance, no person, firm or corporation may "work in, occupy, or, directly or indirectly, in any manner whatsoever, utilize any place or premises" in which the storage business is conducted without the license therein prescribed. This is the offense of which Thompson was convicted. It was within the competency of the local legislative body to render this a punishable offense, essential to the enforcement of the policy of the ordinance; the power is an integral part of the general grant of authority

to license and regulate contained in sec. 40:52-1(g) and 40:52-2, supra.

Lastly, it is said that the ordinance imposes excessive fines and penalties in contravention of Article I, par. 15, of the State Constitution.

The penalty prescribed for a violation of the ordinance is imprisonment for a term not exceeding 90 days, or a fine not exceeding $200, or both, with an additional provision that each day during which a violation "shall continue shall constitute a separate offense;" that the magistrate may, in his discretion, imprison one so convicted for a term not exceeding 90 days, "in default of the payment of any fine;" and that execution may issue against goods and chattels to recover an unpaid fine.

We are not called upon to determine the validity of all these sanctions. A fine of $200 was the penalty imposed upon each of the convicted respondents, Independent Warehouses, Inc. and Thompson; and a fine in this amount coupled with imprisonment for 90 days cannot reasonably be deemed excessive in constitutional intendment. Vide R. S. 40:49-5. The ordinance contains a provision that in case "any section or part" thereof shall be held illegal or unconstitutional, such invalidity "shall not be construed as impairing the force and effect of the remainder of the ordinance." If it be conceded *arguendo* that the cumulative penalty clause is invalid in whole or in part, the remainder of the provision for sanctions is severable and would stand unaffected.

[fols. 419-420] The judgments of the Supreme Court are accordingly reversed, and the judgments of conviction are affirmed.

[File endorsement omitted.]

[fol. 421] IN NEW JERSEY COURT OF ERRORS AND APPEALS

INDEPENDENT WAREHOUSES, INC., a corporation of the State of New York, and Pennsylvania Coal Company, a corporation of the Commonwealth of Pennsylvania, and Erie Railroad Company, a corporation of the State of New York, intervening parties, Prosecutors-Appellees,

vs.

WILLIAM SCHEELE, Recorder of the Township of Saddle River, and the Township of Saddle River, a municipal corporation of the State of New Jersey, Defendants-Appellants.

ORDER OF REVERSAL AND REMITTITUR TO SUPREME COURT—
Filed March 7, 1946

This case coming on to be heard at the October term, 1945, in the presence of counsel for the respective parties, and the case having been read, and the argument of counsel, as well as the record and proceedings duly considered upon the appeal set forth and specified in the grounds of appeal;

It is thereupon on this 31st day of January, 1946, ordered and adjudged that the judgment of the Supreme Court be and the same is hereby reversed and the judgment of conviction be and the same is hereby affirmed, and it is further ordered that the record be remitted to the Supreme Court to be proceeded with in accordance with this judgment and the practice of said Court.

On Motion of Chandless, Weller & Kramer, Attorneys of Defendants-Appellants.

[fol. 422] [File endorsement omitted.]

[fol. 423] IN NEW JERSEY COURT OF ERRORS AND APPEALS

JAMES THOMPSON, Prosecutor-Appellee,

vs.

WILLIAM SCHEELE, Recorder of the Township of Saddle River, and the Township of Saddle River, a Municipal Corporation of the State of New Jersey, Defendants-Appellants

ORDER OF REVERSAL AND REMITTITUR TO SUPREME COURT—Filed March 7, 1946

This case coming on to be heard at the October term, 1945, in the presence of counsel for the respective parties, and the case having been read, and the argument of counsel, as well as the record and proceedings duly considered upon the appeal set forth and specified in the grounds of appeal;

It is thereupon on this 31st day of January, 1946, ordered and adjudged that the judgment of the Supreme Court be and the same is hereby reversed and the judgment of conviction be and the same is hereby affirmed, and it is further ordered that the record be remitted to the Supreme Court to be proceeded with in accordance with this judgment and the practice of said court.

On Motion of Chandless, Weller & Kramer, Attorneys of Defendants-Appellants.

[fol. 424] [File endorsement omitted.]

[fol. 425] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed March 13, 1946

The above named petitioners-appellants, feeling themselves aggrieved by the final judgments of the New Jersey Court of Errors and Appeals entered on March 7th, 1946, in the above causes respectfully show:

I. Petitioners are the Appellants in the above entitled causes.

2. On November 30, 1943, Petitioners, Independent Warehouses, Inc., (hereinafter called "Independent"), and James Thompson were convicted, and each fined $200., before the Appellee, William Scheele, Recorder of Saddle River Township, for violation of a municipal ordinance adopted January 25, 1943, by the Appellee, Township of Saddle River, entitled:

> "An ordinance to regulate and license the business of the storage of personal property in warehouses engaged in the business of storing goods for hire and the place or premises in or at which said business is conducted and carried on, to prescribe fees for such licenses, and to provide penalties for the violation of this ordinance,"

[fol. 426] which is fully set forth in the statement of jurisdiction filed herewith.

3. By order of the New Jersey Supreme Court, entered December 14, 1943, petitioners, Pennsylvania Coal Company (hereinafter called the "Coal Company"), and Erie Railroad Company (hereinafter called "Erie") were made parties to the first above entitled action on the side of the prosecutor (Independent), and their names were ordered to be added to the writ of certiorari allowed on December 13, 1943 to Independent.

4. On review of said convictions on writs of certiorari, issued out of the New Jersey Supreme Court on December 13, 1943, said ordinance was declared invalid by said court as applied to the business, place and premises, circumstances and parties involved in said convictions, and said convictions were reversed and set aside, on an opinion filed January 19, 1945, and judgments of reversal were entered in that court on January 29, 1945.

5. On appeal from the judgments of said New Jersey Supreme Court to the New Jersey Court of Errors and Appeals, the latter court, on an opinion filed January 31, 1946, reversed the judgments of the New Jersey Supreme Court and affirmed the convictions aforesaid. Orders of reversal were entered on March 7th, 1946.

6. Before said Recorder, and before the New Jersey Supreme Court and the New Jersey Court of Errors and

Appeals, the above entitled causes were jointly tried, briefed and argued, by stipulation of the parties and the approval of, and were decided in joint opinions on one joint record in each of said courts, respectively.

7. The statement of jurisdiction filed herewith pursuant to Rules 12 and 46 of the Rules of the Supreme Court of the United States, shows that, and particularly set forth [fol. 427] the manner in which, in the proceedings in the above entitled causes, there was drawn in question the validity of a statute of the State of New Jersey, to wit, said municipal ordinance, on the ground of its being repugnant to certain provisions of the Constitution and laws of the United States therein specified, and that the decision of the New Jersey Court of Errors and Appeals was in favor of its validity.

8. The New Jersey Court of Errors and Appeals is the highest court of New Jersey in which a decision in these suits can be had.

9. In said causes there is drawn in question the validity of a municipal ordinance, and convictions thereunder, on the ground that said ordinance is repugnant to the constitution and laws of the United States, and the decision of the New Jersey Court of Errors and Appeals is in favor of its validity, notwithstanding your petitioners' contention that said ordinance, and the convictions thereunder, violate the Fourteenth Amendment and Article I, Section VIII, clause 3, of the Constitution of the United States, and certain laws of the United States specified in the Statement of Jurisdiction filed herewith.

10. Wherefore, in accordance with section 237(a) of the Judicial Code (28 U. S. C. A. Sec. 344), and in compliance with the Rules of Supreme Court of the United States, your petitioners respectfully show that these cases are such in which, under the legislation in force when the Act of January 31, 1928 was passed, to wit, under Section 237(a) of the Judicial Code, a review could be had in the Supreme Court of the United States on a writ of error, as a matter of right.

11. The errors upon which your petitioners claim to be entitled to an appeal are more fully set out in the [fol. 428] assignment of errors filed herewith pursuant to

Rules 9 and 46 of the Rules of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

12. Wherefore, your petitioners pray for the allowance of an appeal from the said New Jersey Court of Errors and Appeals, the highest court in the State of New Jersey in which a decision in these causes can be had, to the Supreme Court of the United States, in order that the decision and final judgments of said New Jersey Court of Errors and Appeals may be examined and reversed, and petitioners also pray that a transcript of the record, proceedings and papers in these causes, duly authenticated by the Clerk of said New Jersey Court of Errors and Appeals, under his hand and the seal of said court, may be sent to the Supreme Court of the United States, as provided by law, and that an order be made touching the security to be required of petitioners and that the cost and supersedeas bond, or bonds, tendered by petitioners be approved, and that said appeal may operate as a supersedeas.

Dated: March 13, 1946.

Clement K. Corbin, Attorney for Petitioners, Independent Warehouses, Inc., and James Thompson.

Willis T. Pierson, Duane E. Minard, Attorneys for Petitioners, Pennsylvania Coal Company, and Erie Railroad Company.

[fol. 429] [File endorsement omitted.]

[fol. 430] SUPREME COURT OF THE UNITED STATES

INDEPENDENT WAREHOUSES, INC., and PENNSYLVANIA COAL COMPANY and Erie Railroad Company, intervening parties, Appellants,

vs.

WILLIAM SCHEELE, Recorder of the Township of Saddle River, and the Township of Saddle River, a Municipal Corporation of the State of New Jersey, Appellees

JAMES THOMPSON, Appellant,

vs.

SAME, Appellees

On Appeal from the New Jersey Court of Errors and Appeals

ORDER ALLOWING APPEAL—Filed March 13, 1946

On petition of appellants in the above entitled causes, for an appeal to the Supreme Court of the United States from Judgments of the New Jersey Court of Errors and Appeals, having been duly presented and filed, accompanied by an assignment of errors and a statement as to the jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in these causes having been considered, it is hereby

Ordered that an appeal be, and it is hereby, allowed to the Supreme Court of the United States from the final judgments dated March 7th, 1946 of the New Jersey Court of Errors and Appeals as prayed in said petition, and the Clerk of the New Jersey Court of Errors and Appeals shall, within forty days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of said New Jersey Court of Errors and [fol. 431] Appeals, a true copy of the material parts of the record herein, which shall be designated by praecipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further ordered that appellants in each of the above entitled causes, shall give a good and sufficient cost and supersedeas bond in the sum of Fifteen hundred dollars

($1500.00) conditioned that said appellants, respectively, shall prosecute said appeal to effect and answer all damages and costs if they fail to make their plea good, and that said bonds, when filed and approved, shall stay, the sending down of the remittiturs or mandates herein and all proceedings in these causes until the final disposition of these causes by the Supreme Court of the United States.

Dated: March 13, 1946.

Luther A. Campbell, Chancellor, and Presiding Judge of the New Jersey Court of Errors and Appeals.

[fol. 432] [File endorsement omitted.]

[fols. 433-451] Supersedeas bonds on appeal for $1,500.00 approved and filed March 13, 1946, omitted in printing.

[fol. 452] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed March 13, 1946

Appellants assign the following errors in the records and proceedings in these causes:

The New Jersey Court of Errors and Appeals erred:

1. In reversing the judgment of the New Jersey Supreme Court, and in affirming the judgments of conviction of appellants, Independent Warehouses, Inc., and James Thompson, by William Scheele, Recorder of the Township of Saddle River:

2. In holding that the ordinance adopted January 25, 1943, by the Township of Saddle River, entitled:

> "An Ordinance to Regulate and License the Business of the Storage of Personal Property in Warehouses Engaged in the Business of Storing Goods for Hire and the Place or Premises in or at Which Said Business Is Conducted and Carried On, to Prescribe Fees for Such Licenses, and to Provide Penalties for the Violation of This Ordinance,"

as applied to the business, property, facilities, services and occupations of appellants, is not repugnant to the Commerce Clause (Article I, Section VIII, Clause 3) of the Constitution of the United States, and some, or all, of the [fol. 453] following provisions of the Interstate Commerce Act as amended (Title 49 of United States Code; 49 U. S. C. A.): Section 1, paragraph (1) and clause (a) thereof; paragraphs (2), (3), (4), (5) and (6); and Section 6, paragraphs (1), (3), (4), (5), (6), (7) and (10); by—

(a) Imposing an unlawful license fee, or excise, or other local, tax for, and as a condition precedent to the right to exercise, the privilege of engaging in interstate commerce;

(b) Imposing an unlawful license fee or tax on the privilege of using and operating transportation instrumentalities, facilities and services, and upon property, instrumentalities and facilities employed exclusively, in interstate commerce;

(c) Imposing undue and unlawful taxes, regulations and burdens upon interstate commerce; and in holding that

(d) Said ordinance did not impose an unlawful additional tax upon the property and facilities used as an instrument of interstate commerce, or upon the coal in storage in lieu of personal property taxes thereto, (*Op. p. 2);

(e) The taxes levied by said ordinance "do not constitute a direct and undue burden upon and therefore a regulation of interstate commerce in contravention of Article I, sec. VIII, cl. 3 of the Federal Constitution" and are not proscribed thereby (Op. p. 4);

(f) "the continuity of the carriage in interstate commerce is broken when the carried commodity is unloaded and stored at Coalberg for an indefinite period, subject to the owners disposal, and thereby the coal becomes intermingled with the general mass of property having a situs [fol. 454] within the state, and subject to the state's dominion and liable to taxation as such; and the stored coal retains that character and status until it is again

(*"Op. p. —" refers to the typewritten opinion of the New Jersey Court of Errors and Appeals attached to the Statement of Jurisdiction filed herewith, and not yet printed.)

shipped in interstate commerce. It does not become the subject of carriage in interstate commerce by reason of its conveyance by rail from Coalberg to other points in New Jersey" (Op. pp. 7-8).

(g) "A tax that only indirectly affects the profits or returns from interstate commerce is not within the ban of the commerce clause" (Op. p. 8).

(h) "* * * if property be stored 'for an indefinite time during transit, at least for other than natural causes or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities'" (Op. p. 8).

(i) "Here movement in interstate commerce had ceased when the storage for an indefinite period began; and the coal then became within the dominion and protection of the state" (Op. pp. 8-9).

(j) "A public warehouse business conducted by another" as agent of a railroad company "does not render" "the franchise grant to the railroad company immune from regulation and taxation under sec. 40:52-1(g) and 40:52-2" of New Jersey Revised Statutes (Op. pp. 9-10), and that said statutes do not "exempt a public warehouse of this category from the operation of the cited statute, simply because the railroad company uses the facility for what it terms intransit storage after the movement in commerce has come to an end." (Op. p. 10).

3. In holding that said ordinance, as applied to appellants and their business, property, facilities, services and employments, does not abridge, or violate, the rights of appellants, or any of them, guaranteed by, and is not repugnant to, the Fourteenth Amendment of the Constitution of the United States by—

(a) Depriving them of their property without due process of law for the reason that the license fee prescribed by the ordinance is arbitrary, unreasonable, prohibitory, and confiscatory.

[fol. 455] (b) Denying to them the equal protection of the laws for the reason that the ordinance in effect provides for a license, and a tax, upon the business and property of

the prosecutors, which is arbitrary, excessive and discriminatory.

(c) Denying to them, and abridging, their privileges and immunities as citizens of the United States in that, said ordinance, in effect, arbitrarily prevents them from carrying on their lawful business of storing coal in transit in interstate commerce.

(d) Imposing a license fee, under the exercise of the police power, in an amount in excess of the reasonable expenses of issuing the license, and administering and enforcing its provisions.

(e) Exposing them to, or imposing, unreasonable and excessive penalties and punishments, constituting a denial of equal protection of the laws for the reason that the ordinance prescribes, as a penalty for the violation thereof, imprisonment for a term not exceeding ninety days, or to a fine not exceeding $200.00, or both, for each day that a violation of any of the terms or provisions of the ordinance shall continue, and in holding that;

(f) The constitutional limitations governing an *ad valorem* property tax do not apply to a license tax (Op. p. 3).

(g) "* * * we perceive no force to the contention that the license fee is arbitrary, unreasonable and prohibitory, and repugnant to the Federal * * * constitutional guaranties, in that (1) the license fee is measured on a square foot basis 'without relation to volume of business conducted, tone of coal in storage, or gross or net earnings of the operation'; (2) the fee is fixed 'without relation to the value of the privilege of conducting the business,' and is exhorbitant; and (3) the fee is in *quantum* such as will 'prevent the conduct of this interstate business within the municipality'. (Op. p. 10).

[fol. 456] (h) "There is not such disparity between the 'value of the privilege' and the levy as would render the ordinance arbitrary and discriminatory" (Op. p. 10).

(i) "* * * there is no merit in the contention that the municipality does not possess power under the cited

enabling act 'to penalize an employee because his employer fails to comply with a licensing ordinance' * * *" (Op. p. 11).

(j) "It was within the competency of the local legislative body to render this a punishable offense, essential to the enforcement of the policy of the ordinance; the power is an integral part of the general grant of authority to license and regulate contained in sec. 40:52-1, 40:52-1 (g) and 40-52-2" of New Jersey Revised Statutes (Op. p. 11).

4. In failing and refusing to hold that said ordinance is void because—

(a) It is indefinite and uncertain in the amount of the *amount of the* license fee intended to be exacted;

(b) It unlawfully vests in the municipal officials the arbitrary power and discretion to determine the adequacy of the license fee presented with the license application and reject the application;

(c) It unlawfully vests in the municipal officials the arbitrary power and discretion to revoke any license granted by them, without prescribing definite, or any, rules, regulations and conditions for the guidance of such officials in the execution of such powers and discretion;

In those respects the ordinance, denies to appellants due process of law and equal protection of laws, in violation of the Fourteenth Amendment of the Constitution of the United States.

5. In failing and refusing to decide the question whether, and in not deciding that, the ordinance exposed appellants to, or imposed upon them, unreasonable and excessive penalties and punishments, for the reason that the ordinance denied to them the equal protection of the laws in violation of the Fourteenth Amendment of the United States (Op. pp. 11-12).

[fols. 457-459] Wherefore, on account of the errors hereinabove assigned, appellants pray that said judgments of the New Jersey Court of Errors and Appeals, dated March

7th 1946, in the above entitled causes, be reversed, and judgments entered in favor of these appellants.

Clement K. Corbin, Attorney for Appellants, Independent Warehouses, Inc. and James Thompson.
Willis T. Pierson, Duane E. Minard, Attorneys for Appellants, Pennsylvania Coal Company and Erie Railroad Company.

Dated: March 13, 1946.

[fols. 460-461] Citation in usual form showing service on Chandless, Weller & Kramer, omitted in printing.

[fol. 462] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed March 15, 1946

To the Clerk of the New Jersey Court of Errors and Appeals:

SIR:

Take Notice that you are requested to include in the transcript in the above entitled cause to be filed with the Supreme Court of the United States, the following papers:

1. The State of Case filed with the New Jersey Court of Errors and Appeals.
2. The opinion of the New Jersey Court of Errors and Appeals filed January 31, 1946.
3. The judgments of the New Jersey Court of Errors and Appeals, namely Rules for Reversal and Remittitur entered March 7th, 1946.
4. The Petition for Appeal to the Supreme Court of the United States.
5. The Order Allowing Appeal to the Supreme Court of the United States.

[fol. 463] 6. Appeal Bonds.
7. Statement of Jurisdiction.
8. Assignment of Errors.
9. Citation on Appeal.

10. Proof of service of Petition for Allowance of Appeal, Order Allowing Appeal, Statement of Jurisdiction, Assignment of Errors and Citation.

11. Praecipe with acknowledgment of service endorsed thereon.

12. Certificate of Return of the Clerk of the New Jersey Court of Errors and Appeals.

Respectfully yours, Clement K. Corbin, Attorney for Appellants, Independent Warehouses, Inc., and James Thompson. Willis T. Pierson and Duane E. Minard, Attorneys for Appellants, Pennsylvania Coal Company and Erie Railroad Company.

Dated: March 13, 1946.

Service of a copy of the foregoing Praecipe is hereby acknowledged the 14th day of March, 1946.

Chandless, Weller & Kramer, By Ralph W. Chandless, Attorney for Appellees.

[fol. 464] [File endorsement omitted.]

[fol. 465] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 466] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON—Filed April 11, 1946

Appellants state the following points on which they intend to rely:

I. The ordinance requires the obtaining of a license and the prepayment of a license fee as a condition precedent to the right of Appellants, or some of them, to conduct an instrument of transportation service in interstate commerce, and imposes taxes, regulations, instructions, and burdens upon interstate commerce, in violation of the Commerce Clause of the Constitution of the United States and the Interstate Commerce Act.

II. The Township of Saddle River had no authority to require a license, and impose a license fee, for the privilege of conducting the transportation facility at the Coalberg property.

III. The license fee prescribed by the ordinance is arbitrary, unreasonable, discriminatory, and prohibitory, and (2) deprives appellants, and each of them, of their [fol. 467] property without due process of law; (b) denies to them equal protection of the laws; and (c) denies to them their privileges and immunities as citizens of the United States, in violation of the Fourteenth Amendment of the Constitution of the United States.

IV. The ordinance is an arbitrary and discriminatory device to tax, and obtain public revenue from appellants, or some of them, in lieu of personal property taxes upon coal, stored at the Coalberg storage plant, which is exempt from taxation, and thereby deprives the appellants of the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

V. The ordinance is indefinite, uncertain, arbitrary, unreasonable and unlawful, (a) as to the amount of the license fee, (b) as to the discretionary powers it purports to confer upon the members of municipal governing body, and its officers and agents, and thereby denies to appellants the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States.

VI. The ordinance exposes appellants to, and imposes, excessive fines and penalties and thereby denies to Appellants due process of law and the equal protection of the law, in violation of the Fourteenth Amendment of the Constitution of the United States.

Dated March 13, 1946.

Clement K. Corbin, Attorney for Appellants, Independent Warehouses, Inc., and James Thompson. Willis T. Pierson, Duane E. Minard, Attorneys for Appellants, Pennsylvania Coal Company and Erie Railroad Company.

[fol. 468] Service hereof acknowledged this 4th day of April, 1946.

Harry Cane, Attorney for Appellees.

[fol. 469] SUPREME COURT OF THE UNITED STATES

DESIGNATION OF RECORD—Filed April 11, 1946

Appellants designate the following parts of the record, certified to the Supreme Court of the United States by the Clerk of the New Jersey Court of Errors and Appeals, which they consider *unnecessary* for the consideration of this appeal ("Printed Record Page" references herein relate to the printed "State of Case," in the New Jersey Court of Errors and Appeals):

Part of Record to be omitted:	Printed Record page
Exhibit P-11 (letter Dec. 8, 1941)	71–78
Exhibit D-2 (Map) opposite	82
Exhibit D-3 (Map) opposite	82
Exhibit D-4 (pleadings and proceedings in U. S. D. C., Dist. of N. J. Civil Action No. 2861)	84–123
Correspondence between counsel, from line 30 on	132)
to and including line 20 on	141)
[fol. 470] Colloquy of Counsel from line 20 on	141)
to and including end of	148)
Chandless draft of stipulation	149–151
Hobart, Minard & Cooper draft of stipulation	152–154

Dated: March 13, 1946.

Clement K. Corbin, Attorney for Appellants, Independent Warehouses, Inc., and James Thompson. Willis T. Pierson, Duane E. Minard, Attorneys for Appellants, Pennsylvania Coal Company and Erie Railroad Company.

Service hereof acknowledged this 4th day of April, 1946.
Harry Cane, Attorney for Appellees.

[fol. 471] [File endorsement omitted.]

[fol. 472] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—May 27, 1946

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdic-

tion is noted and the case is transferred to the summary docket.

Mr. Justice Jackson took no part in the consideration or decision of this question.

Endorsed on cover: File No. 50,799, New Jersey, Court of Errors and Appeals, Term No. 83. Independent Warehouses, Inc., Pennsylvania Coal Company, Erie Railroad Company and James Thompson, Appellants, vs. William Scheele, Recorder of the Township of Saddle River, and the Township of Saddle River. Filed April 11, 1946. Term No. 83 O. T. 1946.

FILE COPY

Office Supreme Court, U. S.
FILED
APR 11 1946
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1096 83

INDEPENDENT WAREHOUSES, INC., PENNSYLVANIA COAL COMPANY, ERIE RAILROAD COMPANY AND JAMES THOMPSON,

Appellants,

vs.

WILLIAM SCHEELE, RECORDER OF THE TOWNSHIP OF SADDLE RIVER, AND THE TOWNSHIP OF SADDLE RIVER

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

STATEMENT AS TO JURISDICTION

CLEMENT K. CORBIN,
WILLIS T. PIERSON,
DUANE E. MINARD,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1096

INDEPENDENT WAREHOUSES, INC., PENNSYLVANIA COAL COMPANY, ERIE RAILROAD COMPANY AND JAMES THOMPSON,

Appellants,

vs.

WILLIAM SCHEELE, RECORDER OF THE TOWNSHIP OF SADDLE RIVER, AND THE TOWNSHIP OF SADDLE RIVER

ON APPEAL FROM THE NEW JERSEY COURT OF ERRORS AND APPEALS

STATEMENT OF JURISDICTION

The basis upon which Appellants contend that this court has jurisdiction upon appeal to review the final judgments in question, dated March 7th, 1946, of the New Jersey Court of Errors and Appeals, which is the highest court in the State of New Jersey in which a decision can be had, are hereinafter set forth:

1. The provisions of the Judicial Code which confer jurisdiction upon the Supreme Court of the United States are

Section 237(a) (28 U. S. C. A., Sec. 344(a)), reading as follows:

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

Some of the decisions in which the Supreme Court of the United States has sustained its jurisdiction, under the above quoted Section 237(a), of the Judicial Code, on appeal from judgments of the highest state courts, are *Western Turf Assn.* v. *Greenberg*, 204 U. S. 359, 362 (pgf. 1); *Nashville, C. & St. L. Ry. Co.* v. *White*, 278 U. S. 456, 460; *Great Northern Ry. Co.* v. *Minnesota*, 278 U. S. 503, 506. Some of the cases decided in the present term of the Supreme Court of the United States in which it has assumed, without question, like jurisdiction are *Hospital* v. *Cass County*, 90 L. Ed. Adv. Op., pp. 2, 3, —— U. S. ——; *Marsh* v. *Alabama*, 90 L. Ed. Adv. Op. 227, 228, —— U. S. ——; *Tucker* v. *Texas*, 90 L. Ed. Adv. Op. 235, —— U. S. ——.

For the purposes of these provisions of the Judicial Code, the word "statute" includes a municipal ordinance, *King Mfg. Co.* v. *Augusta*, 277 U. S. 100, 114; *Zucht* v. *King*, 260 U. S. 174, 176.

2. The "statute" of the State, the validity of which is here involved, is a municipal ordinance, adopted January 25, 1943, by the Township of Saddle River, a municipal subdivision of the State of New Jersey, located in Bergen County, which ordinance reads as follows:

"TOWNSHIP OF SADDLE RIVER,

Bergen County

An Ordinance to Regulate and License the Business of the Storage of Personal Property in Warehouses Engaged in the Business of Storing Goods for Hire and the Place or Premises in or at Which said Business is Conducted and Carried on, to Prescribe Fees for such Licenses, and to Provide Penalties for the Violation of this Ordinance.

Be It Ordained by the Township Committee of the Township of Saddle River, in the County of Bergen:

1. Within the limits of the Township of Saddle River, no person, firm or corporation shall conduct or carry on the business of the storage of personal property in a warehouse engaged in storing goods for hire or work in, occupy, or, directly, or indirectly in any manner whatsoever, utilize any place or premises in which is conducted or carried on the storage of personal property in a warehouse engaged in the business of storing goods for hire, unless and until there shall be granted by the Township Committee of the Township of Saddle River in accordance with the terms of this ordinance, and shall be in force and effect, a license to conduct said business for the place and premises in or at which said business shall be conducted and carried on.

2. Said license shall be applied for by written application filed with the Township Committee. Such application shall set forth the full name and address of the applicant, the kind or character of personal property to be stored, the location of the place and

premises in or at which the business is to be conducted, the total area of the ground space thereof and a diagram of the same. Said application shall also be accompanied with a deposit to cover the license fee for the current year in the amount hereinafter provided.

3. There shall be charged and collected for said license an annual fee to be computed on the basis or rate of three-quarters of a cent (3/4 of 1¢) for each square foot of the total ground area of the place and premises in the Township of Saddle River in or at which said business is conducted or carried on. Said license shall expire on January first of each year. Said license fee shall be payable in advance for each year or part thereof and is hereby expressly declared to be imposed for revenue. The Township Committee may revoke any such license for sufficient cause after notice and hearing.

. . . . . .

7. Any person, firm or corporation who shall violate any term or provision of this ordinance shall upon conviction thereof be subject to imprisonment in the County Jail or in any place provided by the Township of Saddle River for the detention of prisoners, for a term not exceeding ninety (90) days or to a fine not exceeding Two Hundred Dollars ($200.00), or both. Any person so convicted may, in the discretion of the Magistrate by whom he was convicted, in default of the payment of any fine be imprisoned in the County Jail or place of detention provided by the Township of Saddle River, for any term not exceeding ninety (90) days: There may issue out of the court of any Magistrate empowered to impose fines for the violation of this ordinance execution against the goods and chattels of any person, firm or corporation convicted in such court or before such Magistrate. Execution shall be levied and enforced in the same manner as are executions from the small cause court. Each day that a violation of any of the terms or provisions of this

ordinance shall continue shall constitute a separate offense.

8. In the event that any section or part of this ordinance shall be held illegal or unconstitutional such invalidity shall not be construed as impairing the force and effect of the remainder of the ordinance.

9. All ordinances or parts of ordinances inconsistent with this ordinance are hereby repealed as to such inconsistent provisions and this ordinance shall take effect after publication in the manner provided by law."

3. The date of the judgment sought to be reviewed is March 7th, 1946, and the date upon which the application for this appeal was made is March 13, 1946.

4. The following paragraphs show:

(a) That the nature of the case and the rulings of the court were such as to bring the case within the jurisdictional provisions;

(b) A statement of the grounds upon which it is contended that the questions involved are substantial;

(c) The specific stages in the proceedings in the court of first instance and in the reviewing court and the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them by motion to dismiss the proceedings, by "Reasons" (equivalent to assignments of Error) filed in the New Jersey Supreme Court; and the Grounds of Appeal filed by appellees in the New Jersey Court of Errors and Appeals, and the way in which they were passed upon by the several courts; with pertinent quotations of specific portions of the record, or a summary thereof, with specific places in the record where the matter appears, as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provisions believed to confer jurisdiction on

this court. Record references ("R") herein are to the pages of the printed "State of Case" in the New Jersey Court of Errors and Appeals, and the typewritten opinion of that court endorsed: "Filed Jan. 31, 1946, J. A. Brophy, Clerk" received by appellants from said Clerk on February 7, 1946; a true copy of which is attached hereto. Reference herein to the corporate appellants are as follows; Independent Warehouses, Inc. is hereinafter called "Independent"; Pennsylvania Coal Company is hereinafter called the "Coal Company"; Erie Railroad Company is hereinafter called "Erie."

5. Erie is a corporation of the State of New York, a common carrier by railroad, engaged in the transportation of freight, including anthracite coal, in interstate commerce and is subject to the Acts of Congress regulating interstate commerce customarily designated as the Interstate Commerce Act, as amended, and the jurisdiction of the Interstate Commerce Commission. In the performance of its duties as a common carrier, and as required by the provisions of the Interstate Commerce Act, it provided various transportation facilities and services for the transportation and handling of anthracite coal, moving exclusively in interstate commerce under through tariff routes and joint rates, including (from and after February 25, 1939) stop-over privileges at Coalberg, exclusively for the in-transit storage and servicing of interstate shipments of anthracite coal under duly published and filed tariffs prescribing the rates, rules, regulations, and practices governing said in-transit storage facilities and services, pursuant to the provisions of Section 1 paragraphs (3) and (4), and Section 6, paragraphs (1) and (4) of Title 49 USCA). It maintained at a place called Coalberg in the Township of Saddle River, Bergen County, New Jersey, a tariff designated freight station for the handling of all transportation business, and maintained at said station

its duly appointed agent who collected and remitted directly to Erie all charges, accruing under said tariffs for the transportation, storage and other services, on all coal received at, stored in transit, or moving out of, said station. Said storage-in-transit facilities and services were performed for Erie, under written contracts, by Independent and the Coal Company solely as agents, and at the sole expense of Erie.

6. The Coal Company is a corporation of the Commonwealth of Pennsylvania and owns certain lands in the Township of Saddle River upon which it had erected and maintained the necessary tracks, equipment, and machinery for unloading, storage, reloading and other servicing of interstate shipments of coal stored in-transit under a railroad tariff. As contract agent, and at the sole expense, of Erie, it operated said tracks, equipment and machinery, exclusively for unloading, reloading and servicing of such coal owned by shippers, enroute in interstate commerce, under through shipping contracts and tariffs moving under through routes and joint rates from mines in Pennsylvania to ultimate destinations in other states.

7. Independent is a corporation of the State of New York, authorized to transact business in the State of New Jersey, and was, when these actions arose, exclusively engaged at a tariff railroad station designated as "Coalberg" in the Township of Saddle River, Bergen County, New Jersey, solely as agent of Erie, in the storage-in-transit, during stop-over periods under rates, rules, regulations and practices published in a duly filed railroad tariff, of shipper-owned anthracite coal moving exclusively in interstate commerce via through routes and at joint rates.

8. Appellant, James Thompson, was employed at Coalberg in connection with said transportation and storage-in-transit facilities and services.

9. On January 25, 1943, Appellee, Township of Saddle River adopted the above mentioned municipal ordinance.

"TOWNSHIP OF SADDLE RIVER

Bergen County

An Ordinance to Regulate and License the Business of the Storage of Personal Property in Warehouses Engaged in the Business of Storing Goods for Hire and the Place or Premises in or at Which Said Business is Conducted and Carried on, to Prescribe Fees for Such Licenses, and to Provide Penalties for the Violation of This Ordinance.

Be it ordained by the Township Committee of the Township of Saddle River, in the County of Bergen:

1. Within the limits of the Township of Saddle River, no person, firm or corporation shall conduct or carry on the business of the storage of personal property in a warehouse engaged in storing goods for hire or work in, occupy, or, directly, or indirectly in any manner whatsoever, utilize any place or premises in which is conducted or carried on the storage of personal property in a warehouse engaged in the business of storing goods for hire, unless and until there shall be granted by the Township Committee of the Township of Saddle River in accordance with the terms of this ordinance, and shall be in force and effect, a license to conduct said business for the place and premises in or at which said business shall be conducted and carried on.

2. Said license shall be applied for by written application filed with the Township Committee. Such application shall set forth the full name and address of the applicant, the kind or character of personal property to be stored, the location of the place and premises in or at which the business is to be conducted, the total area of the ground space thereof and a diagram of the same. Said application shall also be accompanied with a deposit to cover the license fee for the current year in the amount hereinafter provided.

3. There shall be charged and collected for said license an annual fee to be computed on the basis or rate of three-quarters of a cent (¾ of 1¢) for each square foot of the total ground area of the place and premises in the Township of Saddle River in or at which said business is conducted or carried on. Said license shall expire on January first of each year. Said license fee shall be payable in advance for each year or part thereof and is hereby expressly declared to be imposed for revenue. The Township Committee may revoke any such license for sufficient cause after notice and hearing.

. . . . . .

7. Any person, firm or corporation who shall violate any term or provision of this ordinance shall upon conviction thereof be subject to imprisonment in the County Jail or in any place provided by the Township of Saddle River for the detention of prisoners, for a term not exceeding ninety (90) days or to a fine not exceeding Two Hundred Dollars ($200.00), or both. Any person so convicted may, in the discretion of the Magistrate by whom he was convicted, in default of the payment of any fine be imprisoned in the County Jail or place of detention provided by the Township of Saddle River, for any term not exceeding ninety (90) days. There may issue out of the court of any Magistrate empowered to impose fines for the violation of this ordinance execution against the goods and chattels of any person, firm or corporation convicted in such court or before such Magistrate. Execution shall be levied and enforced in the same manner as are executions from the small cause court. Each day that a violation of any of the terms or provisions of this ordinance shall continue shall constitute a separate offense.

8. In the event that any section or part of this ordinance shall be held illegal or unconstitutional such invalidity shall not be construed as impairing the force and effect of the remainder of the ordinance.

2c

9. All ordinances or parts of ordinances inconsistent with this ordinance are hereby repealed as to such inconsistent provisions and this ordinance shall take effect after publication in the manner provided by law."

10. On November 30, 1943 Independent and James Thompson were arraigned before Appellee William Scheele, as Recorder of the Township of Saddle River, on complaints of the Chief of Police of said Township, verified April 15, 1943, and warrants returned November 30, 1943, and, after pleading not guilty, they were tried in a joint hearing and on a joint record, and each convicted of violation of said ordinance "at a certain place called Coalberg, appearing on the Assessment Map as Block No. 106 D" in said Township (R. 4-12, 21).

11. Independent was convicted on the charge that on April 12, 1943, it—

> "conducted or carried on the storage of personal property in a warehouse engaged in the business of storing goods for hire without there having been granted by the Township Committee of the Township of Saddle River a license, which was then and there in force and effect, to conduct said business for the place and premises in or at which said business was conducted and carried on, in violation of Section 1 of an ordinance" (reciting the title of the ordinance above set forth).

12. James Thompson, an employee, was convicted on the charge that on April 14, 1943, he "worked in, occupied or utilized" the same place or premises.

13. Said Recorder, Appellee William Scheele, imposed upon Independent and James Thompson, each a fine of $200 and directed that, for the enforcement of the fine imposed on Independent—

> "There may issue execution against the goods and chattels of the said defendant Independent Ware-

houses, Inc. to be levied and enforced in the same manner as are executions from the Small Cause Court."

Said Recorder directed that, for the enforcement of the fine imposed on James Thompson, in default of the payment, he "be imprisoned in the County Jail for a term of ninety days (90)".

14. Block 106-D on the Assessment Map of said Township, specified in said complaints and convictions, respectively, as the place or premises in or at which Independent and James Thompson were alleged to have violated said ordinance, comprises a total area of 2,730,296 square feet. Of that total area 462,350 square feet were occupied exclusively by railroad yard tracks and switch connections, with appurtenant wells, water tank, and pumps for supplying water to railroad locomotives, locomotive shed and engine house, power lines and poles for illuminating the railroad yard, and railroad track scales; all of which were used for general railroad purposes, including track access to the transit storage facilities. Of said total area, 574,268 square feet were occupied by floors and pits used solely for the in-transit storage of coal, with appurtenant equipment and machinery for unloading from, and reloading to, railroad cars. The remainder of said total area was unoccupied and unused. At the rate of ¾ of one cent per square foot provided in section 3 of said ordinance, the *annual* license fee for the total area of Block 106-D would amount to $20,475, which is the exact amount of the assessed valuation of that total land area, upon which said Township of Saddle River levied and collected real property taxes for the year 1943; the year of the alleged violation of said ordinance for which Independent and James Thompson were convicted (Exhibits P-1, P-2, and P-3; R. 26-28).

15. At the joint hearing held before Appellee, William Scheele, Recorder of Saddle River Township on November 30, 1943, on the complaints filed against Independent and James Thompson, respectively, which was the initial proceeding in this litigation, their attorney filed on their behalf a written joint motion to dismiss the complaints against them, respectively, upon the following specified grounds, which drew in question the validity of said ordinance, as applied to the conduct of said in-transit storage as applied to the business at Coalberg, as repugnant to the constitution and laws of the United States (R. 17-20).

"1. The ordinance upon which the complaint is based is not a valid exercise of any licensing power of the Township of Saddle River, but is a devise to obtain public revenue from the storage of coal in the Township in a particular instance, in lieu of personal taxes on the coal stored which is exempted from taxation by law.

2. The total ground area of the place and premises in the Township of Saddle River in or at which Independent Warehouses, Inc. conducts or carries on the business of storing coal for hire, is 67.25 acres or 2,929,410 square feet and the annual license fee required to be paid by that company, computed on that area at the rate of three-quarters of a cent for each square foot, as prescribed by said ordinance, amounts to over $20,000. Such license fee is greatly in excess of any total annual earnings that Independent Warehouses, Inc. could obtain from the business of the storage of coal on said premises, and the annual license fee is arbitrary, unreasonable, prohibitory and confiscatory.

3. The business of storing coal for hire by Independent Warehouses, Inc. at the above mentioned place or premises in the Township of Saddle River, consists of the storage of coal shipped from coal mines outside of the State of New Jersey over the railroad of the

Erie Railroad Company, an interstate carrier by steam railroad, under joint tariffs filed by it and other railroad companies with the Interstate Commerce Commission of the United States, which provide for the transportation of the coal to and from the above mentioned coal storage plant used by Independent Warehouses, Inc., for the purpose of its business, under through rates from the point of origin of the shipment to the ultimate destination of the coal, the handling of the coal into and out of the coal storage plant and for storage of the coal therein. The coal stored at said coal storage plant is in the course of transportation in interstate commerce. The license fee required by the aforesaid licensing ordinance of the Township of Saddle River is unreasonable, arbitrary and prohibitory and imposes taxes, regulations, restrictions and burdens upon interstate commerce.

4. Said ordinance purports to be for the purpose of licensing the business of storing personal property for hire in the Township of Saddle River, but erroneously imposes penalties upon persons, firms and corporations who work in, occupy or, directly, or indirectly in any manner whatsoever utilize any place or premises in which such business is carried on unless and until a license under the ordinance has been granted by the Township, notwithstanding such persons, firms and corporations are not engaged in conducting or carrying on the business and are not responsible therefor.

5. The ordinance was passed by the Township Committee of the Township of Saddle River on January 25, 1943, and provides for an annual license fee, payable in advance and that the license shall expire on January first of each year. Therefore, no license is required by the ordinance for any period prior to January 1, 1944.

6. Said ordinance deprives Independent Warehouses, Inc. of its property without due process of law and denies it the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of

the United States and imposes taxes, regulations, restrictions and burdens upon interstate commerce in violation of the commerce clause of the Constitution of the United States and the Acts of Congress to regulate commerce.

7. Said ordinance is, for the reasons above stated, or one or more of them, and in other respects, irregular, defective, unlawful, unconstitutional and illegal.

The defendant James Thompson moves to dismiss the complaint against him on the grounds above stated and on the further ground that on the date mentioned in the complaint he was not responsible for conducting or carrying on the business of the storage of personal property in a warehouse for hire in the Township of Saddle River and can not be lawfully charged with a violation of the aforesaid licensing ordinance of the Township."

16. On December 13, 1943, writs of certiorari, identical except as to the name of the prosecutor, were allowed by the New Jersey Supreme Court to Independent and James Thompson, respectively, as prosecutors, to review the record and proceedings before the Recorder respecting their convictions (R. 1-2).

17. On December 14, 1943 an order was entered in the New Jersey Supreme Court, reciting an application on behalf of the Coal Company and Erie for leave to intervene in the proceedings on the writ of certiorari allowed to Independent; said order further recited:

"and it further appearing from their verified petition presented on this date, that a decision of this court upon said writ may affect adversely the interests of said Pennsylvania Coal Company and Erie Railroad Company, and upon good cause being shown,"

and ordered that the Coal Company and Erie—

"be, and they are hereby, made parties to this action on the side of the prosecutor,"

Said order further provided that their names be added to the writ of certiorari allowed therein; that they, and each of them be given notice of further proceedings; and allowed to take depositions under said writ, which shall constitute part of the record before the court upon the consideration of said writ (R. 2-3).

18. On April 22, 1944, the attorneys for all of the prosecutors and defendants under both of said writs of certiorari stipulated and agreed as follows:—

> "that the proceeding on the writs of certiorari in the above entitled cases, respectively, be presented to the court in one joint record, and that, with the court's approval, they be briefed and heard together" (R. 25).

Thenceforward the proceedings resulting from said writs of certiorari have been presented in one joint record, and these cases have been briefed and heard together in, and with the approval of, the New Jersey Supreme Court and the New Jersey Court of Errors and Appeals.

19. On January 10, 1944, appellants in the above entitled causes, who were prosecutors before that court, filed their "Reasons" in the New Jersey Supreme Court for the reversal and setting aside the proceedings and judgments of convictions of Independent and James Thompson, brought before that court by said writs of certiorari, on certain grounds therein specified that said proceedings and judgments of conviction, and the ordinance under which they were convicted, were invalid, unlawful, unconstitutional and illegal, in this instance, including the following grounds which drew into question the validity of said ordinance, on the ground that said ordinance, and convictions, were repugnant to the Constitution and laws of the United States (R. 22-25).

> "(a) The ordinance is not a valid exercise by the Township of Saddle River of any licensing power or

authority it may have, but is a device of the Township to obtain public revenue from the prosecutors, or one of some of them, in lieu of personal taxes on certain coal stored in the Township which is exempted by law from taxation.

(b) The license fee prescribed by the ordinance is arbitrary, unreasonable and prohibitory and deprives the prosecutors, and each of them, of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and the Constitution and laws of New Jersey.

(c) The ordinance, in effect, provides for a tax upon the property of the prosecutors, and each of them, and denies them the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

(d) The ordinance requires the obtaining of a license and the prepayment of license fee as a condition precedent to the right of prosecutors, or one or some of them, to conduct an instrument of transportation service in interstate commerce, in violation of the Commerce Clause of the Constitution of the United States and the Act of Congress to regulate commerce.

(e) The ordinance imposes taxes, regulations, instructions and burdens upon interstate commerce in violation of the Commerce Clause of the Constitution of the United States and the Act of Congress to regulate commerce.

(f) The ordinance takes the private property of the prosecutors, and each of them, for public use without just compensation, in violation of Article I, paragraph 16 of the Constitution of the State of New Jersey.

(g) The ordinance imposes excessive fines and penalties and inflicts unusual punishments, in violation of Article I, paragraph 15, of the Constitution of the State of New Jersey.

(h) The ordinance, in effect, imposes a tax upon property in violation of Article IV, Section VII, paragraph 12 of the Constitution of the State of New Jersey; which provides that property shall be assessed for taxes under general laws, and by uniform rules, according to its true value.

(i) The ordinance is unreasonable and invalid because it confers discretionary power in the governing body of the Township of Saddle River to grant or revoke licenses without specifying uniform rules and regulations to apply to all applicants or licensees.

(j) The ordinance is not within any licensing power of the Township of Saddle River or authorized by law.

(k) The ordinance denies to prosecutors and each of them, the enjoyment of liberty, to acquire and possess property, and to pursue and obtain safety and happiness, in violation of the Constitution and laws of New Jersey.

(l) The ordinance denies to prosecutors and each of them, their privileges and immunities as citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States.

(m) The ordinance is indefinite and uncertain among other things, as to the amount of license fees and fines and penalties for violations of the ordinance.

(n) The ordinance was passed by the Township Committee of the Township of Saddle River on January 25, 1943, and provides for an annual license fee, payable in advance and that the license shall expire on January first of each year. No license is required by the ordinance for any period prior to January 1, 1944.

2. The ordinance, proceedings and judgments of conviction and the statutes upon which they are based, are for the reasons above stated, or one or more of them, and in other respects, invalid, unlawful, unconstitutional, and illegal."

3e

20. On January 19, 1945, the New Jersey Supreme Court filed a joint opinion in said actions, in which it set aside said ordinance, and convictions, based on the following, *inter alia*, findings and conclusions (R. 387-392; Reported, 132 N. J. L. 390; true copy attached hereto);

(a) That "For the purposes of this litigation" Independent, the Coal Company and Erie "have been, and will be, treated as one entity" (R. 389).

(b) That the storage-in-transit plant at Coalberg was a public facility provided, at the request of shippers, under the requirements of the Interstate Commerce Act as amended (R. 389).

(c) That "None of this coal is sold at Coalberg, all of it is transported in and out of Coalberg by rail" (R. 390).

(d) That the ordinance was invalid because the stored coal was in reality being taxed by the license fees, whereas it is exempt from taxation; that the stored coal is exempt from taxation because of its character as interstate commerce; and because the ordinance was an unreasonable, arbitrary, capricious and discriminatory exercise of the licensing power (R. 391).

(e) That the ordinance was not a reasonable exercise of the police power, but was an arbitrary attempt to raise revenue by discriminating against the business of prosecutors (Appellants here), in the guise of a license fee (R. 391).

(f) That this business was exclusively interstate, and that it did not cease to be such by reason of the interruption of the shipment for storage purposes at Coalberg (R. 391).

(g) That—

"In the instant case the purpose of the in-transit storage was for the economic reasons stated. Coal-

berg was not its (the coal's) destination. Its journey was simply interrupted for the purpose of storage and not for sale. It being a subject of interstate commerce, it is within the exclusive jurisdiction of Congress and the Interstate Commerce Commission. It may not be interfered with by the imposition of this license fee, which we think was upon the occupation or privilege of carrying on such interstate commerce" (R. 392) (Bracketed words supplied).

21. On January 29, 1945, the New Jersey Supreme Court entered judgments reversing, setting aside, and vacating the judgments of conviction entered by Appellee, William Scheele, Recorder of Saddle River Township, against Independent and James Thompson.

22. Appellees appealed from the judgments of the New Jersey Supreme Court and assigned the following specific "Grounds of Appeal", (identical in the above entitled causes) which involved the question of the validity of said municipal ordinance on the ground of its repugnancy to the Constitution and laws of the United States, as contended by appellants and found by the New Jersey Supreme Court (R. 398-400);

(Grounds of Appeal)

"1. Because the Supreme Court erroneously found and determined that the enactment of the said ordinance was not a reasonable exercise of the police power for the promotion of the public health, safety or welfare but was an arbitrary attempt to raise revenue by discriminating against the business of Prosecutors in the guise of license fees and to thus secure from it a sum equivalent to the tax which would accrue were the property not exempt.

2. Because the Supreme Court erroneously found and determined that the business in which the Prosecutors were engaged in this cause was exclusively interstate.

3. Because the ordinance in question was lawfully enacted for the purpose of raising revenue by the imposition of license fees pursuant to R. S. 40:52-2.

4. Because the ordinance in question established a general classification and prescribed a license fee which was not prohibitory or confiscatory.

5. Because the question of whether the Prosecutors business is within interstate commerce was *res adjudicata.*

6. Because the arrangement existing between Independent Warehouses, Inc., Pennsylvania Coal Company and Erie Railroad Company, relied on as rendering the nature of the business in question in this case, within Interstate Commerce was violative of the Federal Interstate Commerce Act, illegal and contrary to public policy."

23. On January 31, 1946 the New Jersey Court of Errors and Appeals filed its joint opinion in said actions reversing the judgments of the New Jersey Supreme Court and affirming the convictions of Independent and James Thompson. A true copy of that opinion is attached hereto. (References thereto herein are by page numbers thereof.) The New Jersey Court of Errors and Appeals held, *inter alia:*

(a) The statutory authority purported to be exercised in the ordinance in question--

> "involves a license or privilege tax or excise levied for both revenue and regulation under the police power * * *" (Op. p. 2, bottom).

(b) The "specific constitutional limitations applicable to *ad valorem* taxes do not apply to license taxes" (Op. p. 3).

(c) "We are clear that the taxes thus levied do not constitute a direct and undue burden upon and therefore a regulation of interstate commerce in contraven-

tion of *Article I, Sec. VIII, cl.* 3 of the *Federal Constitution*" (Op. p. 4).

(d) "But a tax for the privilege of exercising a corporate franchise within the state is not obnoxious to the commerce clause" (Op. p. 4).

(e) "The inquiry is whether the regulation lays an unconstitutional burden on interstate commerce, or a tax upon an independent local service, preliminary or subsequent to any interstate commerce" (Op. p. 8).

(f) "The determinative question is whether there was a cessation of interstate commerce when the goods were placed in storage at Coalberg for an indefinite period of time; and it must be resolved in the affirmative" (Op. p. 9).

(The applicable tariff prescribed a maximum of two years for the storage-in-transit privilege granted to shippers. Ex. P-12, p. 3, pgf. (*e*); R. 124.)

(g) "And we perceive no force to the contention that the license fee is arbitrary, unreasonable, and prohibitory; and repugnant to the Federal and State constitutional guaranties, in that (1) the license fee is measured on a square foot basis 'without relation to volume of business conducted, tons of coal in storage, or gross or net earnings of the operation'; (2) the fee is fixed 'without relation to the value of the privilege of conducting the business', and is exorbitant; and (3) the fee is in *quantum* such as will 'prevent the conduct of this interstate business within the municipality' " (Op. p. 10).

(h) That the coal in storage was not in transit; that its movement in interstate commerce ended when it arrived at Coalberg for storage; that the Ordinance was valid as applied to the business conducted at Coalberg and to persons employed in said business; and that the coal in storage had a taxable situs, and was taxable as local property, in New Jersey, in the form of "a license or privilege tax or excise

levied for both revenue and regulation under the police power."

(i) The court held that it was not called upon to determine, and expressly refrained from determining, the validity of the penalty and punishment provisions of section 7 (R. 15) of the ordinance, which appellants contended denied them the equal protection of the laws (Reason (c), R. 23) and deprived them of their privileges and immunities as citizens of the United States, in violation of the Fourteenth Amendment of the Constitution of the United States (Reason (1), R. 24). It held:

> "If it be conceded arguendo that the cumulative penalty clause is invalid in whole or in part, the remainder of the provision for sanctions is severable and could stand unaffected" (Op. p. 12).

24. On March 7th, 1946, Judgments of reversal of the Judgments of the New Jersey Supreme Court were entered in the New Jersey Court of Errors and Appeals.

25. The storage-in-transit facilities and services of the Erie at Coalberg, were established by tariff provisions (Ex. P. 12, R. 124), effective February 25, 1939 (Ex. P. 4, R. 29-34), as an instrument of the transportation of anthracite coal in interstate commerce, from the mines in Pennsylvania to points in other states, pursuant to provisions of

(a) Section 1, paragraph (3), which defines transportation as including storage, and other, in-transit facilities and services;

(b) Section 1, paragraph (4), which requires the carriers to furnish storage-in-transit facilities and services upon the reasonable request of shippers therefor;

(c) Section 6, paragraph (1), which requires the issuance, and filing with the Interstate Commerce Commission, of

tariffs containing schedules of rates, rules, regulations and practices governing such transportation facilities and services, stating separately all storage charges, all privileges or facilities granted or allowed to shippers and the rules or regulations relating thereto.

(d) Section 6, paragraph (4), which authorizes the carriers to issue and file joint through tariff rates and charges by participating or connecting carriers.

26. The right of the carriers to provide storage-in-transit as part of the transportation facilities and services, and to publish and file tariffs providing rates, rules, regulations and practices governing such facilities and services pursuant to the above mentioned sections of the Interstate Commerce Act, as was done in this case (Ex. P-21, R. 124), and the Public necessity therefor, have been established by many decisions of the Interstate Commerce Commission and the federal courts, including *Elevation Allowances at St. Louis and East St. Louis*, 30 I. C. C. 696; *Elevation Allowances at Kansas City*, 34 I. C. C. 442; *In re Abilene & S. R. Co.*, 148 I. C. C. 316; *Propriety of Operating Practices—New York Warehousing*, 216 I. C. C. 291, 349; *Rates & Charges on Grain and Products*, 91 I. C. C. 105; *Grand R. & I. Ry. Co.* v. *United States*, 222 Fed. 577, 585, Cert. denied 234 U. S. 762; *Blodget Milling Co.* v. *Chicago, M. & St. P. Ry. Co.*, 23 I. C. C. 448; *Central Yellow Pine Assn.* v. *Vicksburg, S. & P. R. Co.*, 10 I. C. C. 193.

27. The storage-in-transit facilities and services of the Erie at Coalberg were established pursuant to the above-mentioned sections of the Interstate Commerce Act, and those facilities and services are available to all shippers, and the regulation of their use and operation, and the tariff rates, rules, regulations and practices applicable thereto, were within the sole jurisdiction of Congress and the Interstate Commerce Commission, and, unless and until said

tariff is suspended or cancelled, or different rates, rules, regulations and practices are prescribed, by order of that commission (which they never were), said tariff rates, rules, regulations and practices constituted the law of the land, and the business of the storage-in-transit of interstate shipments of coal thereunder was a lawful transportation business and service under, and governed solely by, the Interstate Commerce Act, as amended, and subject, only, to the sole and exclusive jurisdiction of the Interstate Commerce Commission, *United States* v. *Wabash R. Co.*, 321 U. S. 403, 413; *Southern Ry.* v. *Reid*, 222 U. S. 424, 440, 441; *Southern R. Co.* v. *Prescott*, 240 U. S. 632, 637; *Cleveland, C., C. & St. L. R. Co.* v. *Dettlebach*, 239 U. S. 588, 593-5; *Central R. Co.* v. *United States*, 257 U. S. 247, 257; *Southern Pac. Term. Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 526; *United States* v. *Pennsylvania R. Co.*, 242 U. S. 208.

28. The practice, in this instance, of employing the Coal Company (the owner of the property and equipment) to operate the mechanical equipment (Ex. P-4, R. 29-34), and Independent to function as warehouseman (Ex. P-5, R. 34-39; Ex. P-6, R. 40-45; Ex. P-7, R. 46-51), as agents of Erie solely for the purposes of carrying on the transportation instrumentalities and business of storage-in-transit of interstate shipments of coal under the above-mentioned provisions of the Interstate Commerce Act, and said joint tariff, was entirely valid and lawful. *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 506, 513; *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 41, 47. *In Railroad Ret. Brd.* v. *Duquesne Warehouse Co.*, 90 Law Ed. Adv. Op. 202; — U. S. —, involving a similar storage-in-transit facility operated, under filed tariffs, for the carrier by a contract agent (pp. 204-206), the court held that the services rendered by the contract agent were services performed "in connection with the transportation of property by rail-

road" (p. 207), and "in connection with the receipt, delivery, storage and handling of property transported by railroad," under the Interstate Commerce Act (p. 204).

29. The New Jersey Court of Errors and Appeals held (Op. p. 4):

> "The regulation of foreign and interstate commerce is a subject within the exclusive jurisdiction of the Congress. This control embraces all the instrumentalities by which such commerce may be carried on. And, while a state may possess the power to tax property having a situs within its confines, whether employed in interstate commerce or not, it cannot impose a tax for the privilege of engaging in such commerce."

There is no question that the storage-in-transit facilities and services of the Erie were at Coalberg were instrumentalities by which interstate commerce was carried on, under the requirements and definitions of the above mentioned section 1, paragraphs (1) and (4), of the Interstate Commerce Act, and the construction thereof in the above cited decisions.

30. The crucial difference of opinion between the New Jersey Supreme Court and the New Jersey Court of Errors and Appeals lies in the following conclusions:

(a) The New Jersey Supreme Court held:

> "None of this coal is sold at Coalberg. All of it is transported in and out of Coalberg by rail (R. 3, 90).
>
> "This business is exclusively interstate. It did not cease to be such by reason of the interruption of the shipment for storage purposes at Coalberg" (R. 391).
>
> "Coalberg was not its (the coal's) destination. Its journey was simply interrupted for the purpose of interstate commerce, it is within the exclusive jurisdiction of Congress and the Interstate Commerce Commission. It may not be interfered with by the imposition of this license fee, which we think is on the

occupation or privilege of carrying on such interstate commerce" (R. 392). (Bracketed words supplied.)

(b) The Court of Errors and Appeals found that the coal is shipped out of storage at Coalberg—

> "to the ultimate destination at the through interstate rate from the point of origin to the new destination, plus reloading charges, 'as a continuance of the original interstate movement', and the balance is paid by the shipper at Coalberg" (Op. p. 7).

That court then held:

> "Thus the continuity of the carriage in interstate commerce is broken when the carried commodity is unloaded and stored at Coalberg for an indefinite period, subject to the owner's disposal, and thereby the coal becomes intermingled with the general mass of property having a situs within the State, and subject to the State's dominion and liable to taxation as such, and the stored coal retains that character and status until it is again shipped in interstate commerce" (Op. pp. 7-8).

31. Upon this difference of opinion between the two courts below, depends the question of the validity of this ordinance, and the convictions of Independent and James Thompson thereunder, insofar as appellees' contentions drew in question the validity of said ordinance as repugnant to Article I, Section VIII, clause 3 of the Constitution of the United States and the Interstate Commerce Act, as amended. If the ordinance is held to be an unlawful attempt to license, tax or regulate the storage-in-transit facilities, services or business of Erie at Coalberg, most, if not all, of the errors assigned in the Assignment of Errors filed herewith are valid objections to the decision of the New Jersey Court of Errors and Appeals.

32. The correctness of the conclusions of the New Jersey Supreme Court and the errors of the New Jersey Court

of Errors and Appeals, on the above question of law, are demonstrated by numerous decisions of the federal courts. In *Baltimore & O. R. Co.* v. *United States*, 24 Fed. Supp. 734 (sustaining the Interstate Commerce Commission's decision reported as *Thomas Keery Co. Inc.* v. *New York, O. & W. Ry. Co.*, 226 I. C. C. 335, 345), the court said:

> (p. 735) "A 'transit' is a stop-over privilege granted by a carrier, by which a break de facto in the continuity of carriage of goods is disregarded, and two legs of a journey are treated as though they were covered without interruption. It unites both legs into a 'through route' for which a joint rate can be published."
>
> * * * * * * *
>
> (p. 735) "The reason why such interruptions are held not to break continuity is because the intent of the parties at the outset to unite all parts of the carriage; and that intent * * * is probably the most important single determinant of continuous carriage, and therefore of 'through routes.'"
>
> "Here it is not material to learn where the methanol is going, but only that it is upon some through route which crosses a boundary of New York."

Other parts of that decision on page 736 are particularly pertinent to the facts in these cases. No appeal was taken from that decision. Other decisions to the same effect, including cases involving precisely the same conditions and practices upon which the Court of Errors and Appeals based its findings and conclusions above quoted from pages 7 and 8 of its opinion, are *Wheelock & Bierd* v. *Akron, C. & Y. Ry. Co.*, 179 I. C. C. 517, 520, (citing *Central R. R. Co.* v. *United States*, 257 U. S. 247; and *Grand Rapids & I. Ry. Co.* v. *United States*, 222 Fed. 577); *Texas Steel Co.* v. *Missouri-K-T. R. Co.*, 225 I. C. C. 337, 339; In *B. & O.*

O. S. W. R. R. Co. v. *Settle*, 260 U. S. 166, 171, the Court said:

> "Under these circumstances, the intention as it was carried out determined, as matter of law, the essential nature of the movement; and hence that the movement through to Madisonville was an interstate shipment. For neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through interstate shipment. These are common incidents of a through shipment; and when the intention with which a shipment was made is in issue, the presence, or absence, of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been intended, these incidents are without legal significance as bearing on the character of the traffic."

33. These cases are not mere tax avoidance cases. All of the property, equipment and facilities at Coalberg were annually assessed and taxed by the Township of Saddle River. For the year 1943 (in which these actions arose) all of the property at Coalberg was assessed against the Coal Company by the Township of Saddle River; land Block 106-D the "Place or premises" involved in these actions, at $20,475; improvements at $113,400. Taxes amounting to $7,770.98 were levied and paid thereon. (Ex. P-2, R. 26.) All property of Erie located in New Jersey, including the franchises under which it operated therein, were regularly assessed by, and paid to, the State under the provisions of Chapters 19 to 29, Title 54, of the Revised Statutes of New Jersey. Section 54: 20-2 of Revised Statutes provides:

> "All property of a railroad * * * company used for railroad * * * purposes shall be assessed and taxed by the state tax commissioner in the manner pro-

vided in chapters 19 to 29 of this title. (Sec. 54:19 et seq), *and the tax so imposed shall be in lieu of all other taxation upon property so subject to taxation.*" (Italics ours.)

Independent and the coal company are foreign corporations authorized to do business in New Jersey under Chapter 15, Title 14, of New Jersey Revised Statutes, and pay franchises taxes on business done in New Jersey, pursuant to Title 54, Chapter 4, Section 19 of the New Jersey Revised statutes. No municipality has authority to levy and collect such taxes. The coal in storage is exempt from taxation under section 54:4-3.20 of New Jersey Revised Statutes, *Pattison & Bowns 1. Township of Saddle River*, 129 N. J. L. 135, aff. 130 N. J. L. 177. Hence, the corporate appellants are regularly taxed for all forms of property, including franchises, which are taxable under the tax laws of New Jersey.

34. These causes involve the very existence of an important instrument of interstate commerce that is in universal, and widespread, use throughout the country, as a commercial and economic necessity and public convenience to the producers, shippers, and consumers, and the distribution, of many commodities, particularly those having seasonal periods of production, transportation or consumption, and for which in-transit storage by carriers, under filed tariffs, is a vital facility of commerce, and sustained supply. A few examples will suffice: Many products of agriculture have seasonal production or limited harvesting periods, but are used throughout the year, including cotton, grain, fruits, vegetables and meat, poultry, butter, eggs and cheese.

Iron ore moving lake-and-rail from mines in Minnesota during the season of open navigation on the lakes to the steel mills in Michigan, Indiana, Ohio, Pennsylvania and

elsewhere, to enable the steel mills to operate the year-round. Anthracite coal is mined throughout the year but has a substantial consumption only during winter months; in order to provide continuous production, and employment for miners; that adequate transportation can be furnished during favorable weather conditions; and that an adequate supply of domestic fuel may be available during winter months when consumption exceeds current mine production. Lumber and steel products are likewise extensively stored in transit. Storage in-transit for various purposes, including processing, enable the application of through routes and rates which materially lessen the cost of transportation to shippers and prices to consumers.

35. Without such accumulations of commodities under storage-in-transit tariffs, at convenient distribution points enroute between sources of supply and ultimate consumption, it would be impossible to provide a steady supply of food, clothing, heat and shelter to areas of dense population, like the New York Metropolitan area with a population of ten million people.

36. If municipalities may tax and regulate the business of furnishing such interstate commerce transportation facilities, and impose substantial license fees (in the cases up to a possible more than $20,000. per year) for one facility, the business could not be conducted without sustaining a staggering additional tax which would, of necessity, increase transportation cost and prices and result in unlawful discrimination among carriers, commodities and communities. If such an ordinance is valid as applied in these cases (as the New Jersey Court of Errors and Appeals has held) not only the carrier, but also each of its officers, agents and employees who "work in, occupy or directly or indirectly in any manner whatsoever utilize the place or premises where the business is conducted, or car-

ried on" (R. 13, 15), is exposed to the hazards of cumulative fines and imprisonments, if their employers should fail to comply with any provision of the ordinance.

37. The grounds of appellants' contest of the validity of said ordinance, and the convictions of appellants, Independent and James Thompson, throughout the course of the litigation in these causes, as set forth in their "Reasons" filed in the New Jersey Supreme Court (R. 22-25) include the following which drew in question the validity of said ordinance on the ground that said ordinance is repugnant to the Constitution and laws of the United States.

(a) That said ordinance as applied, is repugnant to the Fourteenth Amendment of the Constitution of the United States in that it:

(1) Deprived appellants of their property without due process of law (Pgf. (b); R. 22);

(2) Denied them the equal protection of the laws (pgf. (c), R. 23; pgf. (m), R. 24);

(3) Denied to them, and abridged, their privileges and immunities as citizens of the United States (pgf. (i), R. 24; pgf. (1), R. 24);

(b) That said ordinance, as applied, is repugnant to Article I, Section VIII, clause 3, of the Constitution of the United States and the Federal Acts to Regulate Commerce, in that it:

(1) Imposed a license fee or tax for, and as a condition precedent to the right to exercise, the privilege of engaging in interstate commerce (pgf. (d), R. 23);

(2) Imposed a license fee or tax on the privilege of using and operating transportation instrumentalities, facilities and services, and upon property, instrumentalities and

facilities employed, and on property, in interstate commerce (pgf. (a), R. 22; pgf. (d), R. 23; pgf. (j), R. 24);

(3) Imposed undue and unlawful taxes, regulations and burdens upon interstate commerce (pgf. (e); R. 23).

The decision of the New Jersey Court of Errors and Appeals is in favor of the validity of said ordinance, notwithstanding all, or any of the above mentioned contentions of appellants.

38. In addition to the substantial federal questions involving the alleged violation of the Fourteenth Amendment of the Constitution of the United States, the decision and judgments of the New Jersey Court of Errors and Appeals here sought to be reviewed on appeal, involve the substantial federal question of the right of a municipal subdivision of a state to "license and regulate a business" (R. 13) which is exclusively the subject of interstate commerce, and the railroad property, and transportation facilities and services, where that business is established and conducted pursuant, exclusively, to the definitions and requirements of Section 1, paragraphs (3) and (4), and governed by rates, rules, regulations, and practices published in a tariff duly filed with the Interstate Commerce Commission pursuant to the requirements of Section 6, paragraphs (1), (3), (4), (5) and (6), (7) and (10), of the Act to Regulate Commerce (Title 49 USCA).

39. The facts and authorities above set forth demonstrate that, in these cases, there was drawn in question the validity of said municipal ordinance on the ground of its repugnance to the Constitution and laws of the United States as set forth in paragraphs 2 and 3 of the Assignment of Errors filed herewith, and that the decision of the New Jersey Court of Errors and Appeals is in favor of its validity, contrary to Appellants' contentions that said

ordinance, as applied to these cases, violates their rights under the Fourteenth Amendment of the Constitution of the United States, as particularly set forth in paragraph 2 of said Assignment of Errors, and Article 1, Section VIII, clause 3 of the Constitution of the United States and the Acts to Regulate Commerce, as particularly set forth in paragraph 3 of said Assignment of Errors and present substantial grounds of jurisdiction in the Supreme Court of the United States to review said judgments of the New Jersey Court of Errors and Appeals, and to justify, and require, the allowance of the petition of appeal filed herewith.

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Independent Warehouses, Inc.
and James Thompson.

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Pennsylvania Coal Company
and Erie Railroad Company.

Dated: March 13, 1946.

APPENDIX "A"

NEW JERSEY COURT OF ERRORS AND APPEALS

Nos. 4/28 October Term, 1945

INDEPENDENT WAREHOUSES, INC., PENNSYLVANIA COAL COMPANY, and ERIE RAILROAD COMPANY, Prosecutor-Respondents,

vs.

WILLIAM SCHEELE, Recorder of the Township of Saddle River, and TOWNSHIP OF SADDLE RIVER, in the County of Bergen, Defendants-Appellants.

JAMES THOMPSON, Prosecutor-Respondent,

vs.

WILLIAM SCHEELE, Recorder of the Township of Saddle River, and TOWNSHIP OF SADDLE RIVER, in the County of Bergen, Defendants-Appellants.

Argued October 16, 1945; decided January 31, 1946.

On appeal from the Supreme Court, whose opinion is reported in 132 N. J. L. 390.

For the appellants: Chandless, Weller & Kramer; Ralph W. Chandless, of counsel.

For the respondents, Independent Warehouses, Inc., and James Thompson: Collins & Corbin.

For the respondents, Pennsylvania Coal Company and Erie Railroad Company; Hobart, Minard & Cooper. Robert J. Bain, Duane E. Minard and G. Addison Hobart, of counsel for respondents.

The opinion of the court was delivered by HEHER, J.

The challenged ordinance provides for the licensing of "the business of the storage of personal property in a warehouse engaged in storing goods for hire," and "the place of premises" in which such business "is conducted or carried on," and levies, admittedly as a revenue measure,

an "annual fee" to be computed "on the basis or rate of three-quarters of a cent for each square foot of the total ground area of the place and premises" devoted to the business; and it is the insistence of respondent that, since this bylaw lays the license fee upon the "place or premises" in which the storage business is carried on, "measured by land areas," it is, in effect, an additional tax "upon the property," and that, at all events, it is in substance a tax laid upon the stored coal "in lieu of personal property taxes" that would be leviable thereon were it not for the exemption granted by R. S. 54:4–3.20, and thus a negation of that legislative policy. If "Perishable goods" are stored upon the licensed premises, the licensee is under a duty to comply with all health regulations "required by any federal, state or municipal authority." He is also enjoined to observe all police and fire regulations laid down by the local "police and fire authorities." And there is provision for inspection of the premises by the local police, fire and health authorities, and a requirement that the storage of "any inflammable or combustible matter" thereon shall be immediately reported to the governing body. Respondents' business is within the exemption category. *Pattison & Bowns, Inc.* v. *Township of Saddle River*, 129 N. J. L. 135, *affirmed* 130 N. J. L. 177. We find these points to be devoid of substance.

The ordinance was enacted in the purported exercise of the power conferred by *R. S. 40:52-1(g) and 40:52-2*: and these provisions and *sec. 54:4-3.20, supra*, are mutually exclusive. The former involves a license or privilege tax or excise levied for both revenue and regulation under the police power, while the latter section has reference to a property tax merely. The levies may coexist, if such be the legislative intention; and this is the case here. *Sec. 54:4-3.20* plainly confines the exemption to property taxes, i. e. "personal property stored in a warehouse" of one "engaged in the business of storing goods for hire."

License is a means of regulating and taxing privileges and occupations and the use and disposal of property. The exactions thereby made do not take the category of an *ad valorem* property tax. License and property taxes cover

separate and distinct areas of the local taxing power; and they have radically different attributes. *Jersey City* v. *Martin*, 126 N. J. L. 353. See, also *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 41 S. Ct. 695, 65 L. Ed. 1139. The one is a tax upon the business of the warehouseman; the other is a direct tax upon the property of third persons stored in the warehouse. And the exercise of the latter power is confined by specific constitutional limitations which do not apply to the former. There is no suggestion of a legislative purport to render the storage and warehouse business immune from the tax for revenue and regulation permissible under the cited licensing statute. The frame of the statutes is not consistent with the theory of an all-inclusive exemption from taxes of both classes. The contention *contra* necessarily proceeds upon the hypothesis that, prior to the adoption of the exemption statute, the *ad valorem* property tax was exclusive of all license taxes and excises; and this proposition is obviously untenable. The argument of competitive disadvantage is one to be addressed to the legislative forum.

But the exercise of the licensing power cannot exceed the bounds of reason. The law will not suffer confiscation and oppression under the guise of taxation. The quantum of the tax rests in sound discretion, guided by reason; and judicial intervention is justifiable only where there has been an abuse of the power. If the local legislation action is not clearly unreasonable or unduly oppressive or discriminatory, its policy is not a justiciable question. *The Great A. & P. Tea Co., Inc.* v. *Camden*, 122 N. J. L. 47; *Giant Tiger Corporation* v. *Camden*, 122 N. J. L. 240; *American Grocery Co.* v. *Board of Commissioners of New Brunswick*, 124 N. J. L. 293; *Durland* v. *Kearney*, 128 N. J. L. 22.

And we are clear that the taxes thus levied do not constitute a direct and undue burden upon and therefore a regulation of interstate commerce in contravention of *Article I. sec. VIII, cl. 3 of the Federal Constitution.*

The regulation of foreign and interstate commerce is a subject within the exclusive jurisdiction of the Congress. This control embraces all the instrumentalities by which

such commerce may be carried on. And, while a state possesses the power to tax property having a situs within its confines, whether employed in interstate commerce or not, it cannot impose a tax for the privilege of engaging in such commerce. *Helson v. Commonwealth of Kentucky*, 279 U. S. 245, 49 S. Ct. 279, 73 L. Ed. 683; *Sprout v. South Bend*, 277 U. S. 163, 48 S. Ct. 502, 72 L. Ed. 833; *McCall v. People of California*, 136 U. S. 104, 10 S. Ct. 881, 34 L. Ed. 391. But a tax for the privilege of exercising a corporate franchise within the state is not obnoxious to the commerce clause. A tax measured by net profits earned within the state is valid; even though these profits may have been derived in part, or indeed mainly, from interstate commerce. A franchise is deemed a part of the corporate property lawfully taxable in the state. *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113, 41 S. Ct., 45, 65 L. Ed. 165; *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135; *Northwestern Mutual Life Ins. Co. v. Wisconsin*, 247 U. S. 132, 38 S. Ct. 444, 62 L. Ed. 1025. The tax levy here is not of the prescribed class.

The essential facts are not in dispute. The storage plant, commonly known as "Coalberg," is owned by the Pennsylvania Coal Company, a Pennsylvania corporation. It comprises 67¼ acres of land and buildings, tracks, chutes, hoppers, scales, machinery and equipment. The owner leased the yard in its entirety to Independent Warehouses, Inc., a New York corporation, at the nominal annual rental of one dollar. These corporations are wholly owned subsidiaries of the Erie Railroad Company, a common carrier in interstate commerce; and under agreements between these parties, the plant is operated by the Pennsylvania Company "for the benefit and on behalf of," and at the sole expense of the Erie Company's trustees, "as a public service facility for shippers of prepared anthracite coal on Erie lines desiring storage space in accordance with and under the rates named in a certain tariff on file with the Interstate Commerce Commission and the Public Utilities Commission of the State of New Jersey, issued January 24, 1939," and any supplements thereto. The Erie's trustees agreed to maintain an agent at the yard authorized on their behalf to issue warehouse receipts for coal placed therein "for storage by

shippers." The Pennsylvania Company undertook to remit to the trustees, monthly, the net operating surplus; and the trustees assumed the obligation of reimbursement for the net operating loss, if any. By express provisions, "taxes are includable in the "allowable items of expense chargeable against" operation and maintenance. By this arrangement, the Erie's trustees sought to avert the diversion "of shipments of coal * * * to other competing lines on which facilities for coal storage are available."

The agreement with Independent Warehouses, Inc. recites that it was "the desire and for the interest" of the Pennsylvania Company that the lessee should conduct upon the premises the "general business of a warehouseman," and provides that the lessee shall devote the yard to such purposes, and shall furnish storage therein for "any and all types of coal * * * tendered to it for warehousing for the account or at the request of "the Pennsylvania Company (if there shall be available storage space) at the rate of two cents per ton, with a minimum annual charge of $600. There was also a provision for reimbursement of the lessee for its losses, costs and expenses not classable as "ordinary." By a supplemental agreement, the storage rate was reduced to one-half cent per ton, and the annual minimum charge to $500. The New York, Susquehanna and Western Railroad Company has certain contractual trackage rights at the yard, and the use of other facilities. Independent Warehouses, Inc., is engaged in the public warehouse business "at various places in nine states." For some 15 years prior to the agreement with the Pennsylvania Company, Independent had issued warehouse receipts for coal stored in this yard.

The Pennsylvania Company owns and operates anthracite coal mines in the State of Pennsylvania. Coal sold at the mines is, by contract with the purchaser, shipped in interstate commerce over the railroad of the Erie Company, and stored at the Coalberg yard until, at the shipper's direction, it is again conveyed by rail to its ultimate destination. For the in-transit storage, including unloading, reloading, and the incidental services, the shipper pays to the carrier a tariff charge of 28¢ per ton. Free storage is permissable for as long as two years. This storage is designed to meet

seasonable deficiencies and shortages due to the excess of consumption over production, and to facilitate the financing of purchases through negotiable warehouse receipts, all of which, it is said advance the general welfare as well as serve the particular interests of the mine operators, shippers and carriers. Erie's Coal Freight Agent testified that, when because of seasonal conditions the supply exceeds the demand, "the operators bill" coal "to storage, to store it at an advantageous point for reshipment;" that "the shipper hasn't enough orders to ship it out directly to destination;" that all the coal "is consigned to Coalberg, Rochelle Park, for storage, billed at the regular tariff rates from the mine to the storage plant," and "it is held there awaiting orders from the consignee as to what is to happen to it." This course "relieves the car situation," and it "also helps the operator to continue operating."

There is an established tariff charge for the storage; and the argument, in brief, is that through the "contract agencies" of the Pennsylvania Company, as the owner of the plant, and Independent, as "a public warehouseman," the Erie Company "utilizes" these facilities "solely to provide regular tariff in-transit services to its shippers for interstate shipments of coal from the Pennsylvania mines to ultimate destinations through, and beyond, Coalberg, with the facilities provided by the storage of the coal with a public warehouseman, as a regular transportation service facility over its line, pursuant to the demands of shippers;" and that the "tariff charges for this in-transit service are collected by the carriers directly from the shippers, and Erie, and participating carriers, bear the entire expense of the transit facilities."

But the coal is shipped to the purchaser or his consignee at Coalberg, Rochelle Park, and freight charges are collected at the rate prescribed for transportation from the mines to that particular point, plus storage and unloading charges; and, when the coal is reshipped, there is, as we have seen, a new billing to the ultimate destination at the through interstate rate from the point or origin to the new destination, plus reloading charges, "as a continuance of the original interstate movement," and the balance is paid by the shipper at Coalberg. The ultimate is not deter-

mined until the owner gives shipping instructions. Compare *Federal Compress & W. Co. v. McLean*, 291 U. S. 17, 54 S. Ct. 267, 78 L. Ed. 622.

Thus the continuity of the carriage in interstate commerce is broken when the carried commodity is unloaded and stored at Coalberg for an indefinite period, subject to the owner's disposal and thereby the coal becomes intermingled with the general mass of property having a situs within the State, and subject to the State's dominion and liable to taxation as such; and the stored coal retains that character and status until it is again shipped in interstate commerce. It does not become the subject of carriage in interstate commerce by reason of its conveyance by rail from Coalberg to other points in New Jersey. The inquiry is whether the regulation lays an unconstitutional burden on interstate commerce, or a tax upon an independent local service, preliminary or subsequent to any interstate transportation. *People of New York, ex rel. Pennsylvania Railroad Co. v. Knight*, 192 U. S. 21, 24 S. Ct. 202, 48 L. Ed. 325; *McGoldrick v. Berwind-White Coal Min. Co.*, 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565. The question ofttimes is one of remoteness and degree: The tax may be too remote and incidential to constitute a burden on the transaction of the commerce between the states. *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 17 S. Ct. 532, 41 L. Ed. 953. A tax that only indirectly affects the profits or returns from interstate commerce is not within the ban of the commerce clause. *United States Glue Co. v. Oak Creek, supra.*

Property actually in transit in interstate commerce is exempt from local taxation. But if property be stored "for an indefinite time during such transit, at least for other than natural causes or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities." *Kelly v. Rhoads*, 188 U. S. 1, 23 S. Ct. 259, 47 L. Ed. 359. There, Mr. Justice Brown found that the earlier cases declared the principle to be that, "while the property is at rest for an indefinite time awaiting transportation, or awaiting a sale at its place of destination, or at an intermediate point, it is subject to taxation. But if it is actually in transit to another state, it becomes the subject of interstate com-

merce and is exempt from local assessment." If there was a cessation of interstate commerce the goods became subject to the jurisdiction of the state of their situs. Actual transit is the determinant. Here movement in interstate commerce had ceased when the storage for an indefinite period began; and the coal then came within the dominion and protection of the state. As in the case of *Susquehanna Coal Co. v. South Amboy*, 76 N. J. L. 412, affirmed 77 N. J. L. 798, there was something more than an incidental interruption of the continuity of the transportation through the state. On a bill in equity to restrain the collection of taxes levied in that case, the Federal Supreme Court expounded the principle that, even though the delay in interstate transportation was but temporary, if it was availed of for "a business purpose and advantage," the commodity during that particular period "secured the protection of the state," and it was therefore subject to local taxation. *Susquehanna Coal Co. v. South Amboy*, 228 U. S. 665, 35 S. Ct. 712, 57 L. Ed. 1015.

The case of *Lehigh and Wilkes-Barre Coal Co. v. Junction*, 75 N. J. L. 68, affirmed *Ibid.* 922, is to the same effect. It does not matter that there the goods were owned by the carrier. That does not serve to vary the application of the principle. The determinative question is whether there was a cessation of interstate commerce when the goods were placed in storage at Coalberg for an indefinite period of time; and it must be resolved in the affirmative. To borrow the language of Mr. Justice McKenna in the case of *General Oil Co. v. Crain*, 209 U. S. 211, 28 S. Ct. 475, 52 L. Ed. 754, the coal "required storage there,—the maintenance of the means of storage; of putting it in and taking it from storage." See, also, *State, Detmold and Cox, Pros., v. Engle*, 34 N. J. L. 425; *State, Lehigh & W. Coal Co., Pros., v. Carrigan*, 39 N. J. L. 35.

It is also urged that the Erie Company "and its agents" conduct "a common carrier public service facility for the transportation and in-transit storage of coal at Coalberg, under franchises and authority conferred" by the State of New Jersey, and it therefore cannot be required "to obtain a municipal license for the privilege of exercising its franchise."

Obviously, the franchise grant to the railroad company do not render immune from regulation and taxation under *sec. 40:52-1(g)* and *40:52-2, supra,* a public warehouse business conducted by another, even though the operator be one of its corporate subsidiaries. The question is essentially one of legislative intention; and there is no indication whatever of a purpose to exempt a public warehouse of this category from the operation of the cited statute, simply because the railroad company uses the facility for what it terms in-transit storage after the movement in commerce has come to an end.

And we perceive no force to the contention that the license fee is arbitrary, unreasonable and prohibitory, and repugnant to Federal and State constitutional guaranties, in that (1) the license fee is measured on a square foot basis "without relation to volume of business conducted, tons of coal in storage, or gross or net earnings of the operations;" (2) the fee is fixed "without relation to the value of the privilege of conducting the business," and is exorbitant; and (3) the fee is in *quantum* such as will "prevent the conduct of this interstate business within the municipality."

A tax on a public warehouse graduated according to storage capacity is familiar legislative practice. *Vide Federal Compress & W. Co. v. McLean, supra.* The license has reference only to the public warehouse business transacted at the warehouseman's established place of business within the State. *W. W. Cargill Co. v. Minnesota,* 180 U. S. 452, 21 S. Ct. 423, 45 L. Ed. 619. And under the ordinance in the case at hand, the warehouse corporation may protect itself against the inclusion of areas not devoted to storage in the calculation of the tax. There is a presumption that the tax is reasonable in amount; and the burden rests upon the challenger to overthrow that presumption. It has not been sustained here. There is not much disparity between the "value of the privilege" and the levy as would render the ordinance arbitrary and discriminatory. The parties are in disagreement as to the *quantum* of the tax upon the stored coal per ton. Based upon respondents' estimate of total plant area and capacity, the tax per ton would amount to 2¼¢ while the personal property tax would range between 29¢ and 58¢ per ton. From 1903 to 1940, when tax

exemption was claimed under *sec. 54:4-3.20*, the plant was successfully managed notwithstanding that property taxes were paid on the stored coal in an amount not less than the current license tax.

And there is no merit in the contention that the municipality does not possess power under the cited enabling act "to penalize an employee because his employer fails to comply with a licensing ordinance," and therefore the conviction of the individual respondent Thompson, cannot be sustained.

Under the ordinance, no person, firm or corporation may "work in, occupy, or, directly, or indirectly in any manner whatsoever, utilize any place or premises" in which the storage business is conducted without the license therein prescribed. This is the offense of which Thompson was convicted. It was within the competency of the local legislative body to render this a punishable offense, essential to the enforcement of the policy of the ordinance; the power is an integral part of the general grant of authority to license and regulate contained in *sec. 40:52-1, 40:52-1(g) and 40:52-2, supra.*

Lastly, it is said that the ordinance imposes excessive fines and penalties in contravention of *Article I, par. 15, of the State Constitution.*

The penalty prescribed for a violation of the ordinance is imprisonment for a term not exceeding 90 days, or a fine not exceeding $200, or both, with an additional provision that each day during which a violation "shall continue shall constitute a separate offense;" that the magistrate may, in his discretion, imprison one so convicted for a term of not exceeding 90 days, "in default of the payment of any fine;" and that execution may issue against goods and chattels to recover an unpaid fine.

We are not called upon to determine the validity of all these sanctions. A fine of $200 was the penalty imposed upon each of the convicted respondents, Independent Warehouses, Inc. and Thompson; and a fine in this amount coupled with imprisonment for 90 days cannot reasonably be deemed excessive in constitutional intendment. Vid., *R. S. 40:49-5.* The ordinance contains a provision that in case "any section or part" thereof shall be held illegal or

unconstitutional, such invalidity "shall not be construed as impairing the force and effect of the remainder of the ordinance." If it be conceded arguendo that the cumulative penalty clause is invalid in whole or in part, the remainder of the provision for sanctions is severable and would stand unaffected.

The judgments of the Supreme Court are accordingly reversed, and the judgments of conviction are affirmed.

Check list (in both cases)

For Reversal—Chancellor, Chief Justice, Parker, Donges, Heher, Perskie, Colie, Oliphant, Rafferty, Freund, McGeehan (11).

For Affirmance—Wells, Dill (2).

APPENDIX "B"

NEW JERSEY SUPREME COURT, OCTOBER TERM, 1944

(Reported, 132 N. J. L. 390)

No. 243/244

INDEPENDENT WAREHOUSES, INC., a Corporation of the State of New York, and Pennsylvania Coal Company, a Corporation of the Commonwealth of Pennsylvania, and Erie Railroad Company, a Corporation of the State of New York, Intervening Parties, Prosecutors,

vs.

WILLIAM SCHEELE, Recorder of the Township of Saddle River, and the Township of Saddle River, a Municipal Corporation of the State of New Jersey, Defendants

JAMES THOMPSON, Prosecutor,

vs.

WILLIAM SCHEELE, Recorder of the Township of Saddle River, and the Township of Saddle River, a Municipal Corporation of the State of New Jersey, Defendants

Argued October 4, 1944. Decided January 19, 1945.

On certiorari

Before Justices Case, Bodine and Porter

For prosecutors, Independent Warehouses, Inc. and James Thompson: Collins & Corbin; Robert J. Bain, of Counsel.

For prosecutors, Pennsylvania Coal Company and Erie Railroad Company: Hobart, Minard & Cooper; Duane E. Minard and G. Addison Hobart, of Counsel.

For the defendants: Chandless, Weller & Kramer; Ralph W. Chandless of Counsel.

The opinion of the Court was delivered by Porter, J.

The writs of certiorari in these two cases bring before us for review the convictions of the prosecutors, Independent

Warehouses, Inc. and James Thompson, its employee, for violation of Section I of an ordinance of the defendant municipality on charge of storing coal in a warehouse without having first obtained a license therefor. The ordinance in question provides for the licensing of the business of conducting the storage of personal property in a warehouse for hire and provides a penalty for violation of the said ordinance of imprisonment not exceeding ninety days or a fine not exceeding $200.00, or both. It is not denied that Independent Warehouses, Inc. was operating such a business on premises within the municipality at storage yards commonly called Coalberg and that Thompson was employed by it.

Independent Warehouses, Inc. is a corporation of New York, authorized to do business in New Jersey, and is engaged in storing goods for hire in ten states, including the warehouse at the Coalberg plant. It has operated this plant since June 20, 1939 in the storage of coal shipped in interstate commerce, for the benefit of and at the expense of Erie Railroad Company, and has shipped over that road exclusively as an in-transit facility for interstate shipments of coal.

The Pennsylvania Coal Company is a corporation of Pennsylvania where it mines and sells anthracite coal. It holds title to the Coalberg property.

The Erie Railroad Company is a common carrier by railroad engaged in interstate commerce. Independent Warehouses, Inc. and Pennsylvania Coal Company are subsidiary corporations of Erie Railroad Company, the capital stock in both corporations being wholly owned by it. The Pennsylvania Coal Company and Erie Railroad Company were allowed to intervene in these proceedings. For the purpose of this litigation they have been, and will be, treated as one entity.

It is the practice of the prosecutors to store large quantities of anthracite coal in their yard at Coalberg in the defendant municipality. This yard has a capacity of storing about 400,000 tons of coal. It is convenient, if not indeed necessary, in marketing this coal and transporting it to the ultimate consignee to have a place of storage in which to accumulate it during the slack season, it not being possible

or practical to deliver it directly from the mines at the peak season of its need by the consumer.

The proofs show that the Erie Railroad Company and Pennsylvania Coal Company have entered into a written contract which provides that coal be shipped to and stored at Coalberg as a public facility for in-transit storage of coal under railroad tariffs under supervision of an Erie agent stationed at Coalberg, who collects freight and storage charges. The purpose of this arrangement is to provide a reserve supply of coal in large quantities produced in slack season and made available when needed in the winter season and to facilitate the financing of the purchase when desired by negotiation of warehouse receipts. It also appears that shippers of coal require these facilities, that it is necessary for carriers to provide them and that the Federal Act to Regulate Commerce provides that they be furnished by the carriers upon reasonable request of shippers. The fact with respect to this coal is that it is all owned by shippers or consignees and is shipped in interstate commerce from the mines in Pennsylvania to the ultimate destination in, or beyond, the New York metropolitan area with in-transit stop-over privileges at Coalberg. None of this coal is sold at Coalberg. All of it is transported in and out of Coalberg by rail.

The controversy between these parties is over the right of the municipality to levy taxes on this coal. This yard is operated as a warehouse, and the taxation of the coal was set aside by this court and our opinion was affirmed by the Court of Errors and Appeals in *Pattison & Bowns, Inc. v. Saddle River Township* in 129 N. J. L. 135, aff'd. 130 Id. 177. It was there held that coal stored in fenced-in piles on an otherwise open tract of land equipped with machinery to handle the same is within the purview of R. S. 54:4-3.20 (exempting from taxation goods stored in warehouse.)

The attempt was then made to accomplish the same result by the adoption of the ordinance under which the prosecutors were convicted. This ordinance provides for the licensing of warehouses and fixing the license fee at 3/4 of a cent per square foot of storage space. It appears that the space occupied by stored coal in this warehouse on that basis of licensing fees would bring in a revenue of

about $11,000. a year, a sum approximately equivalent to the amount of the tax previously and unsuccessfully levied on the coal.

The prosecutors raise many questions in their attack on the legality of this ordinance, the principal ones being that the coal in reality is being taxed by the license fees, whereas it is exempt from taxation, because it is in warehouse as held by the *Pattison & Bowns* case, *supra;* also it is exempt from taxation because of its character as interstate commerce, also because of an unreasonable, arbitrary, capricious and discriminatory exercise of the licensing power.

We think these arguments are well made and that the ordinance is invalid. The prosecutors were engaged in a legitimate business, and it seems to us that the enactment of this ordinance was not a reasonable exercise of the police power for the promotion of public health, safety or general welfare but was an arbitrary attempt to raise revenue by discriminating against the business of prosecutors in the guise of license fees, and to thus secure from it a sum equivalent to taxes which would accrue, were the property not exempt. Compare *Resciniti* v. *Board of Commissioners of Belleville*, 117 N. J. L. 1; *Vassallo* v. *Orange*, 125 N. J. L. 419; *N. J. Good Humor, Inc.*, v. *Bradley Beach*, 124 N. J. L. 162; *Gurland* v. *Kearny*, 128 N. J. L. 22; *Passaic* v. *Paterson Bill Posting Co.*, 72 N. J. L. 285; *O'Mealia Outdoor Advertising Co.* v. *Rutherford*, 128 N. J. L. 58; *The Great A. & P. Tea Co., Inc.*, v. *Camden*, 122 N. J. L. 47; *Grant Tiger-Corp.* v. *Camden*, 122 N. J. L. 240; *American Grocery Co.* v. *New Brunswick*, 124 N. J. L. 293, aff'd. 126 Id. 367.

This business was exclusively interstate. It did not cease to be such by reason of the interruption of the shipment for storage purposes at Coalberg. The facts in the instant case distinguish it from *Lehigh & Wilkesbarre Coal Co.* v. *Junction*, 75 N. J. L. 68, aff'd. 75 Id. 922. In this case the taxation of coal was sustained because the coal was not subject to interstate commerce, as its destination was in the state where the tax was levied. It was stored here indefinitely until sold. In the instant case the purpose of the in-transit storage was for the economic reasons stated. Coalberg was not its destination. Its journey was simply

interrupted for the purpose of storage and not for sale. It being a subject of interstate commerce it is within the exclusive jurisdiction of Congress and the Interstate Commerce Commission. It may not be interfered with by the imposition of this license fee, which we think was upon the occupation or privilege of carrying on such interstate commerce. Compare *Erie Railway Co.* v. *The State*, 31 N. J. L. 531; *West Jersey & Seashore Railroad Co.* v. *Lake & Risley Co.*, 105 N. J. L. 314; *United States* v. *Pennsylvania Railroad Co.*, 242 U. S. 208; *New Jersey Bell Telephone Co.* v. *State Board of Taxes & Assessments*, 280 U. S. 338.

For these reasons the ordinance will be set aside, and the convictions under review will be reversed.

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APR 11 1946

CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

No. 1096 OCTOBER TERM, 1945.

83

INDEPENDENT WAREHOUSES, Inc., and PENNSYLVANIA COAL COMPANY and ERIE RAILROAD COMPANY, intervening parties,

Appellants,

vs

WILLIAM SCHEELE, Recorder of the Township of Saddle River, and the TOWNSHIP OF SADDLE RIVER, a municipal corporation of the State of New Jersey,

Appellees,

JAMES THOMPSON,

Appellant,

vs.

Same,

Appellees.

On Appeal from the New Jersey Court of Errors and Appeals.

APPELLANTS' BRIEF ANSWERING APPELLEES' STATEMENT OPPOSING JURISDICTION, AND OPPOSING APPELLEES' MOTION TO DISMISS THE APPEAL, AND AFFIRM THE JUDGMENTS BELOW.

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April 10, 1946.

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Statement.

On March 27, 1946, Appellants were served with Appellees' Statement Opposing Jurisdiction, upon which is founded Appellees' motions, served the same day, to dismiss this appeal on the ground that the case presents no substantial Federal question, and the alternate motion for affirmance of the decision of the New Jersey Court of Errors and Appeals on the ground that the questions on which the decision in this cause depends are so unsubstantial as to leave no further argument. That statement and motion are included in the certified record, without designation by praecipe as provided by Rule 10, paragraph 2, of the rules of this Court.

Appellants' Statement of Jurisdiction, filed herein March 13, 1946 sets forth the grounds of jurisdiction upon which this appeal is founded, with reference to both the statutory appellate jurisdiction of this Court, and the substantial Federal questions involved in the merits of the case.

ARGUMENT.

This brief will follow the order of the numbered divisions of the statement opposing jurisdiction.

POINT 1.

Appellees assert in point 1, that the decision of the Court below is not reviewable on this appeal, for the following reasons (a), (b) and (c), which are answered under each

stated reason. In support of these reasons they cite two cases hereinafter discussed;

(a) That the validity of a statute of the United States is not drawn in question.

This case does not draw into question the validity of a statute of the United States.

(b) That the validity of a statute of any state is not drawn in question on the ground of its being repugnant to the constitution or laws of the United States.

The Assignment of Errors, the Statement of Points, the Statement of Jurisdiction, and the certified record filed herein, show that there was drawn into question the validity of an ordinance of the Township of Saddle River as being repugnant to the constitution and laws of the United States, and the court below decided in favor of its validity, within the provisions of section 237(a) of the Judicial Code (28 U. S. C. A. Sec. 344(a)). *Assignment of Errors*, paragraphs 2, 3 and 5, *Statement of Points; Statement of Jurisdiction*, paragraphs 1, 2, 15, 19, 20, 22, 23, 26-32, 34-39.

(c) That the authority of the Township of Saddle River under the laws of New Jersey to adopt the ordinance in question was settled by the decision of the New Jersey Court of Errors and Appeals and is not open to attack here.

The authority of the Township of Saddle River, under the laws of New Jersey, to adopt the ordinance in question is not involved in this appeal.

Appellants' challenge of the ordinance on this appeal, is directed to its application, and the conviction of Appel-

lants' Independent Warehouses, Inc., and James Thompson, thereunder, with respect to the attempt, by its authority, to license and regulate the business of conducting an exclusively interstate transportation facility and service, in violation of the Interstate Commerce Act (Title 49 U. S. Code; 49 U. S. C. A.), Section 1, paragraph (1) and clause (a) thereof, paragraphs (2), (3), (4), (5), (6); and Section 6, paragraphs (1), (3), (4), (5), (6), (7) and (10), *Assignment of Errors*, paragraph 2; and with respect to the abridgement and violation of appellants' rights guaranteed by the Fourteenth Amendment of the Constitution of the United States, *Assignment of Errors*, paragraphs 3, 4, 5.——

In *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, this court said:

(p. 289)

"That the statute was not claimed to be invalid in toto and for every purpose does not matter. A statute may be invalid as applied to one state of facts, and yet valid as applied to another."

* * * * * * * * *

"Nor does it matter on what ground the court upheld and enforced the statute."

(p. 290)

"Our conclusion on the jurisdictional question is that, as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error." (Now appeal.)

In that case the state statute involved was not held invalid in toto, but was held invalid as applied in that case to transactions in interstate commerce.

Another case pertinent to this point, is the recent case (decided February 25, 1946) of *Nippert* v. *City of Richmond*, 90 L. ed. Adv. Rep. 496; U. S. . Since that decision is not presently available in official reported form in the Supreme Court reports, page references herein are to 90 L. ed. Adv. Op. report. That case is applicable here, not only on the question of jurisdiction of this Court on this appeal but also, upon the merits of those issues themselves. It involved a municipal licensing ordinance, and its impact upon interstate commerce as applied by the state court in that case involved the same principles here contended for by appellants.

For these reasons the *Nippert* case is also, and equally, applicable to the questions involved in points 2, 3 and 4 hereinafter discussed.

In the *Nippert* case, this court stated the question as follows:

(p. 497)

> "The question is whether a license tax laid by an ordinance of the City of Richmond, Virginia, upon engaging in business as solicitor, can be applied in the facts of this case consistently with the commerce clause of the Federal Constitution, Article I, Sec. 8".

Then the court said:

(p. 502)

> "Apart from the fact that the tax as applied here is laid directly upon sales arising only under con-

tracts requiring interstate shipment of goods, cf. 309 US 48 ff, 84 L. ed. 571, 60 S. Ct. 388, 128 ALR 876, the contentions entirely misconceive what is meant by discrimination or undue burden in the sense applicable to these problems."

* * * * * * * * *

(p. 504)

"It is no answer, as appellee contends, that the tax is neither prohibitive nor discriminatory on the face of the ordinance; or that it applies to all local distributors doing business as appellant has done. Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern. To ignore the variations in effect which follow from application of the tax, uniform on the face of the ordinance, to highly different fact situations is only to ignore those practical consequences. In that blindness lies the vice of the tax and of appellee's position."

The decisions of this court relied upon by appellees in support of their above-mentioned Point 1 are *Fischer* v. *St. Louis*, 194 U. S. 361 and *Schaefer* v. *St. Louis*, 194 U. S. 373. They were companion cases arising under the same ordinance of the City of St. Louis, and the latter case was decided on the opinion in the former.

That ordinance regulated the erection and use of cow stables and dairies within the city, and involved only an exercise of the police power in the interest of public health and welfare. The cow stables and dairies involved were private enterprises, and those cases involved no question affecting, or of taxing, regulating or burdening, interstate

commerce. The issues upon which this Court took jurisdiction, and heard and decided the case, were those asserted under the Fourteenth Amendment, which were raised in the present case, as shown in Appellants' Statement of Jurisdiction, Assignment of Errors, and Statement of Points, cited above under this point.

POINT 2.

Appellees assert in Point 2 that any federal question that may exist in the present case has been so explicitly foreclosed by prior decisions as to afford no basis for an appeal; and that the present case is identical with four cases therein cited, which will be later discussed. We submit that that is a question for this Court to decide.

The facts as stated, from the opinion of the court below in the Statement Opposing Jurisdiction (pp. 1-4), are:

Erie Railroad Company is a common carrier in interstate commerce. The Coalberg plant (located in Saddle River Township, New Jersey) was operated for the benefit, on behalf, and at the sole expense (including taxes), of Erie as a public service facility for shippers of anthracite coal on Erie lines desiring storage space in accordance with, and under, rates named in a tariff on file with the Interstate Commerce Commission. Erie maintained an agent at the yard, authorized, on its behalf, to issue warehouse receipts for coal placed therein by shippers.

Coal sold at the mines (in Pennsylvania) is, by shipping contracts with the purchasers, shipped in interstate commerce over the railroad of Erie and stored at the Coal-

berg yard until, at the shipper's direction, it is again conveyed by rail to its ultimate destination. The shipper pays to the carrier a tariff charge for the in-transit storage, including unloading, reloading and the incidental services.

The opinion states the economic reasons for this storage practice, all of which advance the general welfare as well as serve the particular interest of the mine operators, shippers and carriers. All of the coal handled at Coalberg is consigned to the Coalberg plant for storage.

There is an established tariff charge for the storage, and the opinion refers (without criticism) to Appellants' contention that through its contract agencies, Erie utilizes this facility solely to provide regular tariff in-transit services to its shippers for interstate shipments of coal from Pennsylvania mines to ultimate destinations through, and beyond, Coalberg, with facilities provided by the storage of coal with a public warehouseman, as a regular transportation service facility over its line, pursuant to demands of shippers. The tariff charges for this in-transit service are collected by Erie directly from the shippers, and Erie bears the entire expense of the transit facilities.

The coal is shipped to the purchaser or his consignee at Coalberg and freight charges are collected at the published tariff rate for transportation to that point, plus storage and unloading charges, and when the coal is reshipped there is, the opinion states, "a new billing" to the ultimate destination at the through interstate rate from the point of origin in Pennsylvania to the new destination, plus reloading charges, as a continuance of the original interstate movement and the balance of the interstate through rate is paid by the shipper at Coalberg.

The fact is not disputed that, during the storage period, the coal remains in the exclusive custody of the carrier under the original shipping contract and the applicable through tariff and is subject only to the shippers' instructions as to movement out of storage.

The court below concluded that, since the ultimate destination is not determined until the owner gives shipping instructions,

> " * * * the continuity of the carriage in interstate commerce is broken when the carried commodity is unloaded and stored at Coalberg for an indefinite time subject to the owner's disposal * * *".

(maximum tariff storage allowance 2 years), and that it was therefore subject to the state's dominion and was taxable, and that the stored coal retains that status until it is again shipped in interstate commerce.

The taxable status of the coal has nothing to do with this case. Under the laws of New Jersey, none of it was taxable against any of these appellants because they were not the owners of any of it. As against the owners of the coal in storage, it was exempt from taxation under the state statute. *Pattison & Bowns* v. *Township of Saddle River*, 129 N. J. L. 135, *affirmed* (by the Court below) 130 N. J. L. 177. The avowed purpose of this ordinance was to collect from appellants the equivalent of, or more than, the taxes which the Township could not levy against the owners of the coal. *Independent Warehouses, Inc.* v. *Saddle River*, 52 Fed. Supp. 96, 96-97; *Independent Warehouses, Inc.* v. *Saddle River*, 132 N. J. L. 390, 392.

The fact that "a new billing," or a reshipment, may occur to cover the continuation of the through interstate journey from point of origin to ultimate destination is not determinative of the question of the interstate status of the stored coal, *Baltimore & O. R. Co.* v. *United States*, 24 Fed. Supp. 734, 735, 736; *Missouri Pac. R. Co.* v. *Schnipper*, 51 Fed. (2d) 749; *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95, 103-104. It was the original intention of the shippers, of the original shipping contract, and of the tariffs covering the shipment, that governs (see cases cited in Appellants' Statement of Jurisdiction, paragraph 32).

In *United States* v. *Erie R. R. Co.*, 280 U. S. 98, wood pulp was imported to Hoboken, New Jersey, by shipload. Upon arrival the agent of the shipper gave to the terminal company at Hoboken instructions for shipment of parts of the cargo; two or three cars at a time, by rail to Garfield, New Jersey, and made out bills of lading, and paid the freight, covering the shipments from Hoboken to Garfield; both in New Jersey.

Although the original shipment was made to Hoboken, the Interstate Commerce Commission ordered the Erie and connecting carrier to establish and import rate applicable to that movement on a finding: [p. 101]

> "that from the time the pulp is placed on board steamers at foreign ports there is a continuing intent on the part of the shipper that it shall be transported to Garfield."

The carriers contended, and the United States District Court for the District of New Jersey held, on a contest of that order, that the shipments under new local bills of lading from Hoboken to Garfield was an intrastate movement.

The decision of the District Court was reversed by this Court. The pertinent part of that decision reads:

(pp. 101-102)

> "But the nature of the shipment is not dependent upon the question when or to whom the title passes. * * * It is determined by the essential character of the commerce. * * * It is not affected by the fact that the transaction was initiated or completed under a local bill of lading which is wholly intrastate. * * * or by the fact that there may be a detention before or after the shipment on the local bill of lading * * *."

The asterisks in this quotation indicate the omission of citations of cases, including *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95, above cited.

This Court sustained the above quoted finding of the Interstate Commerce Commission, and held that "The rail transportation is in fact a part of foreign commerce" (p. 102).

In the *Carson Petroleum* case the same contention was made, and sustained by the state court (p. 10), on a similar factual situation, as above quoted from the opinion of the court below. The opinion in the *Carson Petroleum* case exhaustively reviewed the cases on both sides of the line of distinction on this question and decided in favor of appellants' contention on this appeal. The decisions on both sides of the line of distinction on this question were also reviewed in *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 174-176. In the latter case the court said that the first line of cases therein considered "makes it quite clear that a state tax upon the privilege of operating in, or upon carrying on,

interstate commerce is invalid" (p. 174). Then follows a specification of the classes of inhibited license, or other taxes imposed by state or local authorities.

The present case involves the storage and servicing of interstate shipments of coal which are temporarily stopped for in-transit railroad storage at a point intermediate between the mines in Pennsylvania and the ultimate destinations through, and beyond, the point of storage to points in other states under through tariff routes and through tariff rates. Whether the ownership of the coal changes in the course of transit between point of origin and ultimate destination is immaterial because buying and selling of commodities for shipment in, during, or at the end of, interstate transportation is a part of the interstate commerce itself, as was held by this court in *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290-291 and *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50, 54; both of which are cases involving, and sustaining, appellants' contentions in the present case.

In the *Lemke* case, a state licensing and regulating act was held invalid as applied to the circumstances of that case. The state's contention that it had the right to enact laws for such licensing and regulation in the exercise of the police power in the interest of the welfare of its people, was overruled as applied to interstate commerce, even though the business regulated was located within the state (p. 59). The Court held (p. 59):

> "Thus the states cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it."

The same principle was declared, in even broader language, in the later case of *New Jersey Bell Telephone Co. v. State Board*, 280 U. S. 338, 346-347, 349.

In *Sproul v. South Bend*, 277 U. S. 163, the municipal license tax was held invalid as applied to an interstate bus operation. That ordinance, similarly to the ordinance involved in this case, made no distinction between buses engaged exclusively in interstate commerce, those engaged exclusively in intrastate commerce, and those engaged in both classes of commerce (p. 167). The Court held (p. 171):

> "But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business."
>
> . . . . . .
>
> "A state is equally inhibited from conditioning its exercise (the right to conduct the business) on the payment of an occupation tax[.]". (Bracketed words supplied).
>
> (p. 172)
>
> "For the ordinance is void because of the imposition of the license fee."

The decision of the court below was based upon the legal conclusion, above quoted under this point, that the business licensed was a local incident separate and distinct from interstate commerce. That was the State's contention, and

the conclusion of the State Court, in *Nippert* v. *City of Richmond*, above cited. In overruling that contention and reversing that conclusion this Court said:

(p. 500)

"If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involves 'incidents' occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired result.

It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax. This is not to say that the presence of so-called local incidents is irrelevant. On the contrary the absence of any connection in fact between the commerce and the state would be sufficient in itself for striking down the tax on due process grounds alone; and even substantial connections, in an eco-

> nomic sense, have been held inadequate to support the local tax. But beyond the presence of a sufficient connection in a due process or 'jurisdictional' sense, whether or not a 'local incident' related to or affecting commerce may be made the subject of state taxation depends upon other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce."

All of the cases cited in support of Appellees' point 2 are distinguishable from the present case either because the commodity in question was in the private possession and control of the owner, or had not yet entered, or had ended, its status as interstate commerce. In none of those cases was the commodity in the custody of a common carrier, or in storage in a transportation facility, as defined in Section 1(3), under in-transit railroad tariffs which connected inbound and outbound movements and were issued and filed with the Interstate Commerce Commission under other sections above mentioned, of the Interstate Commerce Act.

In *Susquehanna Coal Co.* v. *South Amboy*, 228 U. S. 665, Pennsylvania coal was shipped under billing and transportation contracts ending at Perth Amboy, to be unloaded from the cars and held for future sale and distribution under new sales and shipping contracts. The producer and owner of the coal held it in its own possession with the intention of keeping a supply on hand to fill anticipated orders. That case sustained a state tax on the coal because the transportation movement and contract had ended, and the coal was at rest in the state (p. 669).

The case of *Susquehanna Coal Co.* v. *South Amboy* was distinguished in *Missouri Pac. R. Co.* v. *Schnipper*, 51 Fed. (2d) 749.

Federal Compress & W. Co. v. *McLean*, 291 U. S. 17, is not pertinent to this case. That case involved a private enterprise. The principal question, which is not involved in the present case, was whether a federal warehouse license exempted the company from the tax in question, or a license fee for operating local cotton compresses.

The opinion shows that all of the cotton handled was collected from local points in the State of Mississippi for compression "into bales of standard weight and size, suitable for shipment," whereupon the bales were "delivered to the rail carrier for interstate transportation" (p. 20).

The court said (p. 21):

> "It is clear that by all accepted tests the cotton, while in appellant's warehouse, has not begun to move in interstate commerce * * * its journey interstate does not begin * * * until its shipment to points of destination outside the state."

(p. 22):

> "Here the privilege taxed is exercised before interstate commerce begins * * *."

In the present case an entirely different situation exists; shipping contracts were made at points of origin in Pennsylvania for through shipment to points of ultimate destination in other states, with a stopover privilege for storage-in-transit at Coalberg. One leg of the journey, in in-

terstate commerce, had already been accomplished before storage. Whether the ultimate destination was in, or outside, New Jersey made no difference, since the first leg from the mines in Pennsylvania to Coalberg was in interstate movement and Coalberg was never intended to be its ultimate destination. The movements in and out of storage were connected by the tariff provisions and the original shipping contract as a part of one continuous interstate movement. In all cases the coal continued its journey out of Coalberg *by rail* as a continuation of its originally intended and contracted interstate transportation.

Coalberg was not a coal market, as in the *Federal Compress* case, and the *Cargill* case (later discussed), since no coal was sold at Coalberg and no coal from points in New Jersey was handled there. No services were performed at Coalberg except strictly transportation services within the definition of section 1 (3) of the Interstate Commerce Act.

Cargill v. *Minnesota*, 180 U. S. 452, is not pertinent to this case. It involved a state statute requiring a license to operate certain kinds of grain elevators, and the payment of a license fee of *one dollar* per year to be used for the purpose of grain inspection (p. 454).

The case involved a private corporation which purchased, as its own absolute property, grain hauled in by growers in the neighborhood. Cargill never handled or stored grain for others, conducted a warehouse business, or issued warehouse receipts (p. 462). It conducted a strictly private enterprise in which no railroad company was interested, and in which no transportation facility or tariff in-transit service was provided and no railroad company was involved in the action (p. 462).

The court found (p. 462):

> "But the warehouse was used, occupied, and operated by the defendant solely for the purpose of receiving, handling, and shipping its own grain in its private capacity as grain owner and merchant."

No transit grain was stored and no grain in the elevator had begun any interstate shipment (pp. 462-463).

The decision was expressly limited to the circumstances of that particular case, and the act was sustained solely as a valid *police power* regulation (p. 468) of services rendered by Cargill, a party in interest, to the farmers from whom he purchased grain, as "marketmaster, weighmaster, inspector or grader of the grain offered for sale." It was held that the rendering of these services constituted a business of a public character, sufficiently affected with a public interest to warrant regulation by the state to assure correct weights, uniform grades and proper dockage, and to avoid dishonest practices or undue advantages (p. 463, 465, 467). The case was decided upon "questions of local law" (p. 466), and did not involve any question relating to railroad property, operations, transportation facilities, or storage of property in transportation.

In *General Oil Co.* v. *Crain*, 209 U. S. 211, the oil in storage at Memphis was in the private possession and control of the oil company, where it had arrived in interstate commerce, and was intended by its owners to be again shipped under new shipping contracts in interstate commerce. The oil had reached its previously intended destination. Transportation under the tariff and original shipping contract had ended, as in the *Susquehanna Coal Company* case above discussed. No question of carrier custody on be-

half of shippers in interstate commerce, or storage-in-transit under stop-over privileges of railroad tariffs, was involved. The facts in that case are entirely different from those in the present case.

That case was reviewed in this court's opinion in *Bacon* v. *Illinois*, 227 U. S. 504, where the opinion pointed out the features which distinguished it from the present case. In *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95, at pages 104-106, the opinion in *General Oil Co.* v. *Crain*, was reviewed and distinguished, as well as sharply criticized. It was stated (p. 105) that "it must be admitted that it is a close one and might easily have been decided the other way". The Court further said (pp. 105-106):

> "We do not think in deciding the case at bar that we should give the Crain case the force claimed for it by the court below and by counsel for the state. Since its decision this court has had to consider several cases where there was trans-shipment of the commodity from local carriage in a state to a ship at an export port and conveyance thence to a foreign destination. There has been a liberal construction of what is continuity of the journey, in cases where the court finds from the circumstances that export trade has been actually intended and carried through."

It is respectfully submitted that there is no difference, under the Commerce Clause and the Interstate Commerce Act, between interstate and foreign commerce. Intention has the same relevance and control in either case. *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 295, 296.

The statutes, and some of the cases which support Appellants' contentions in respect to this point are cited in

their Statement of Jurisdiction, paragraphs 25 to 28, inclusive.

The above quoted conclusion of the New Jersey Court of Errors and Appeals is a conclusion of law, arising under the commerce clause of the Constitution of the United States and the Interstate Commerce Act, which touches the heart—the *quod erat demonstrandum*—of this controversy. That issue is within the jurisdiction of, and should be reviewed and finally determined by, this Court on appeal, regardless of whether this Court ultimately agrees, or disagrees, with that legal conclusion of the Court below. The contention of Appellees under point 2 of their Statement Opposing Jurisdiction merely begs the question, and presents no valid grounds for dismissing the appeal, or for the affirmance of the judgments of the court below, without a hearing and determination by this Court.

POINT 3.

Appellees assert, in point 3, that this court will not review the findings of fact by the New Jersey Court of Errors and Appeals that the business of appellants, required to be licensed by the ordinance in question in this case, was not engaged in interstate commerce; that the record shows ample evidence to support the findings; and that that is as far as this Court will enter upon a consideration of the question. Obviously, this Court must review the record, and consider the case, in order to determine the adequacy of the evidence upon which the decision below was presented.

The single case cited in support of these assertions is *Great Northern R. Co.* v. *Donaldson*, 246 U. S. 121. That

was a suit for personal injury damages tried before a jury. The factual questions involved related to the negligence of the company. This Court, nevertheless, did review the judgment of the state court on writ of error, and satisfied itself that the findings of fact in the court below were supported by the evidence (p. 123). What it said was (p. 124):

> "In this situation it is enough to say that it is not the province of this court to weigh conflicting evidence."

In the present case all of the evidence showing the interstate nature, character and extent of the transportation business sought to be taxed and regulated under the ordinance in question was presented, without conflict, by Appellants' officers and witnesses. Not one word of evidence was offered on behalf of Appellees in respect thereto, and Appellants' evidence was not contradicted in any respect.

The opinion of the court below did not review all of the evidence, or even refer to, or mention, a large part of it. The opinion refers to only a fragment of the testimony of only one witness. Appellants should not be precluded from the right to have this appeal heard, and determined, on the entire record brought before the Court.

This case depends primarily upon the question whether the coal in storage is in interstate commerce, and, therefore, whether the business sought to be taxed and regulated under this license ordinance is interstate commerce. If Appellees' contention under this point 3 is sound namely, that this Court cannot review and decide, as a question of federal law, the legal conclusion of the Court below that the business of appellants at Coalberg is intrastate,

and not interstate, business, it would be impossible for this Court ever to pass upon such federal questions in any form of review, and the provisions, and purposes, of section 237 of the judicial code could, in every case, be defeated and frustrated by a similar finding, or conclusion, by a state Court. Countenance of such a contention would also defeat, and frustrate, the very purpose and function of this Court as a court of last resort for the final determination of questions arising under the Federal Constitution and laws.

The cases in which similar contentions have been made by appellees on appeal, or defendants on writ of error, are too numerous to cite, nevertheless this Court has reviewed, and decided, them.

This contention of Appellants claims too much, and is ineffective as support for a motion to dismiss this appeal, or for affirmance of the judgments below, without a hearing and determination of the substantial Federal questions presented.

POINT 4.

In their point 4, Appellees assert that this Court will accept the view of the New Jersey Court of Errors and Appeals that the ordinance in question applied only to intrastate commerce, and as to the scope and operation of the ordinance, and hence that no Federal question arising under the Commerce Clause of the Constitution is here for determination.

In the first place, the court below did not decide that this ordinance applied only to intrastate commerce. It

decided, as shown under point 2, that the business conducted at Coalberg was not interstate commerce, as contended by Appellants, and that, therefore, the ordinance was valid as applied thereto.

This assertion of Appellees is similar to that above discussed under points 2 and 3, and our discussion under those two points is included here by reference, and without repeating, under this answer to Appellees' point 4.

In *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 294, this Court said:

> "As in other cases of this character, we accept the decision of the state court of last resort respecting the proper construction of the statute, but are in duty bound to determine the questions raised under the Federal Constitution upon our own judgment of the actual operation and effect of the tax, irrespective of the form it bears or how it is characterized by the state courts."

The case of *Nippert* v. *City of Richmond*, above mentioned in points 1 and 2 is also pertinent under this point 4.

In support of this assertion 4, Appellees cite the single case of *Erie R. R. Co.* v. *Purdy*, 185 U. S. 148. In that case the New York Court of Appeals expressly held that the statute in question was intended to apply, and applied, only to domestic (intrastate) transportation (p. 152), and no attempt was made to apply it to interstate commerce in any form.

This Court accepted that conclusion on the assumption that the act did not require the railroad company to issue mileage tickets covering the transportation of passengers

from one state to another (p. 152). The decision of this Court turned on the question whether a federal question had been seasonably raised in that case and it decided that question in the negative.

The following portions of that decision show the factual distinction between that case and this concerning the existence of a federal question.

(p. 152)

"But the defendant insists that the general allegation in each of its answers; namely, that the statute besides being void as a regulation of interstate commerce, was in violation 'of various other provisions' of the Constitution of the United States, was sufficient to have enabled him, at the trial, to insist that the statute upon which the actions were based was repugnant to the 14th Amendment of the Federal Constitution. If the answer had contained no such specific allegation, still, if at the trial of the case the defendant had, in stating the grounds of his motion for nonsuit, or in some other way, distinctly claimed that the statute on which the actions were based was inconsistent with that Amendment, then it would have been the duty of the court of appeals to determine the question so raised, unless it was waived by the defendant when the case was before that court, or unless its determination could properly be and was placed upon some ground of local or general law adequate to dispose of the case. We state the matter in this way because, as said in *Carter* v. *Texas*, 177 U.S. 442, 447, 44 L. ed. 839, 841, 20 Sup. Ct. Rep. 687, 689, 'the question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a Fed-

eral question, *in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the state*'." (Italics ours.)

(p. 153)

"So, if the highest court of the state, by its final judgment, sustains the validity of a state enactment drawn in question there as repugnant to the Constitution, treaties, or laws of the United States, or denies a right, privilege, or immunity specially set up or claimed in that court for the first time under the Constitution or any treaty, statute, or authority exercised under the United States, this court could review that judgment, although no Federal question was distinctly raised or insisted upon in the trial court."

(p. 154)

"Of course, if upon examining the record this court had found that a Federal question was properly raised, or that a Federal right or immunity was specially claimed, in the trial court, *then our jurisdiction would not have been defeated by the mere failure of the highest court of the state to dispose of the question so raised, or to pass upon the right or immunity so claimed.*" (Italics ours).

In the present case the federal questions were raised, presented; argued and decided throughout every stage of this litigation from its beginning up to the present time. *Appellants' Statement of Jurisdiction*, paragraphs 15, 19, 20, 22, 23, 30; *Assignment of Errors*, paragraphs 2, 3, 4, and 5; *Statement of Points*.

The above quotations from the decision in *Erie R. R. Co. v. Purdy*, conclusively demonstrate that Appellees' assertion in their point 4 has no merit in this case.

POINT 5.

Appellees in point 5 of their Statement Opposing Jurisdiction, assert that (a) there is no support in the record that appellants were deprived in any respect of due process of law or the equal protection of the laws, and that (b) a reasonable tax was imposed on the applicants applicable to all in the same general classification.

Assertion (a) begs the question presented for determination in the paragraphs of Appellants' Statement of Jurisdiction and Statement of Points listed above in next to the last paragraph of the discussion of point 4, and more particularly in paragraphs 3, 4, and 5 of the Assignment of Errors. Those questions are issues of Federal law in this case, and cannot be finally determined except on review in this Court. A naked assertion that the record contains no support for these contentions of Appellants is insufficient to deprive Appellants of the right to a review of an adverse decision in the court below, and a hearing and final determination of those federal questions in this Court.

These questions arise from the terms and provisions of the ordinance, as applied to Appellants, including employees, and their application to the business conducted at Coalberg, if Appellants' contentions are correct, under numerous decisions of this Court, including those cited above and in paragraphs 26, 27 and 28 of Appellants' Statement of Jurisdiction.

The direct, positive and uncontradicted evidence in this record shows that the storage and handling of coal at Coalberg involved no question of the health, welfare or safety of the community or its rseidents (Cert. Record 247). No evidence was offered on behalf of Appellees, and the Court below made no finding, to the contrary. The ordinance does not purport to have been enacted as an exercise of the police power. It expressly states that the license tax imposed thereby was for *revenue*.

The penalty provisions of paragraph 7 of the ordinance give rise to properly and seasonably raised questions of denial of due process and of equal protection of the laws, in violation of the Fourteenth Amendment of the Federal Constitution, which the court below expressly declined to decide, as it was its duty to decide, *Erie Railroad Co.* v. *Purdy*, 185 U. S. 148, at page 154, as above quoted under point 4. Some of the pertinent decisions showing the existence and importance of these Federal issues, are—*Wadley S. R. Co.* v. *Georgia*, 235 U. S. 651, 662; Ex Parte *Young*, 209 U. S. 123, 145, 163; *Edwards & Browne Coal Co.* v. *Sioux City*, 213 Iowa 1027, 240 N. W. 711; *Federal Trade Com.* v. *Millers' Nat'l Federation*, 23 Fed. (2d) 968; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 102; *Terrace* v. *Thompson*, 263 U. S. 197.

Those decisions also deal with the question of the intimidation of employees who were, as in this case, subject to penalties for the failure of their employers to comply with statutes or ordinances, involved, and who were exposed, as here, to cumulative daily panalties for failure of their employers to comply with the statute or ordinance.

Assertion (b) has two branches (1) the reasonableness of the license tax and (2) the applicability of the ordinance to all in the same general classification.

(1) The assertion of reasonableness is based on the finding of the court below that the tax imposed by the ordinance in question is reasonable, without determining the amount of the annual tax. That was one of the questions at issue throughout the litigation in the state courts. It was decided favorably to Appellants by the New Jersey Supreme Court (certified Record, p. 391) and adversely to Appellants in the New Jersey Court of Errors and Appeals.

Throughout this controversy the municipal authorities have never stated, and have persistently refused to indicate, the correct amount of the annual license fee required by the ordinance for the business conducted at Coalberg, and nowhere throughout this litigation in the state courts has either court decided what was the correct amount of the annual license fee applicable to that business under the provisions of the ordinance.

The only indications that have appeared are the following:

The complaints upon which Independent Warehouses, Inc. and James Thompson were convicted alleged violation at the place or premises shown on Block 106-D known as Coalberg, (Certified Record, pp. 7-8), which contains 2,730,296 square feet. At ¾ of a cent per square foot, as the ordinance provides, the annual license fee would amount to $20,475, which is the exact amount of the assessed valuation upon which property taxes were paid on that parcel of land for 1943, the year in question (Ex. P-2, Cert. Record, pp. 26, 182).

The New Jersey Supreme Court estimated (without stating how the amount was arrived at) the annual license fee at "about $11,000." (Cert. Record p. 390).

The only reference in the opinion of the New Jersey Court of Errors and Appeals to the area involved is 67¼ acres (copy of op. attached to Appellants' Statement of Jurisdiction, p. 4, last line). That area is equivalent to 2,929,410 square feet. At ¾ of a cent per square foot, the annual license fee on that area would be $21,970.57. The assessed valuation upon which property taxes were paid on that area in 1943 was $21,747., or $227.50 *less* than the annual license fee (Ex. P-2, Cert. Record, pp. 26, 181).

The undisputed evidence in the record, and the finding of the Court below, show that the license tax sought to be imposed under this ordinance upon Erie's contract agents, would fall on Erie and become a direct charge upon the transportation facilities and service used and rendered by it under its storage-in-transit tariff, and must be borne out of the tariff charges for interstate transportation.

The ordinance itself, and the undisputed evidence in the record, shows that the license fee sought to be imposed upon appellants bears no relation, and was not intended to bear any relation, to the volume of the business or its revenues, or the value of the privilege to be licensed. This ordinance did not fix a flat, or specified, annual license fee. The exact amount is undeterminable from the ordinance itself, but is left to computation by the applicant, or the Township officials, and the latter have never been able, or willing, to determine that amount.

All other licensing ordinances of the Township of Saddle River, licensing 36 different businesses (none of which

apply to employees of such business), prescribe flat annual license fees ranging from one dollar up to a maximum of five hundred dollars for outdoor carnivals and rendering plants. (Cert. Record, pp. 79-80.) In 1943 (the year of appellants' prosecution under the ordinance in question) the total revenue of the Township from all other business licenses was $4,374. (Cert. Record, p. 306). A comparison of that total license revenue from all other businesses licensed with any of the amounts above-indicated as a possible, or probable, annual license fee under the ordinance here in question, for the privilege of conducting this one legitimate business at Coalberg indicates a very real issue of unreasonableness, and other issues, arising under the Fourteenth Amendment, which this Court should hear and determine.

All real and personal property, and all corporate and franchises, taxes assessable under the laws of New Jersey against each and all of appellants have been regularly assessed, and the taxes thereon have been regularly paid by them. This proposed annual license tax for the privilege of conducting the business is not in lieu of, but is in *addition* to, all of those assessments and taxes. Under those circumstances, the large amount of the license tax, however computed, supports Appellants' contentions, and the view of the New Jersey Supreme Court, that this ordinance constituted an "unreasonable, arbitrary, capricious and discriminatory exercise of the licensing power." (Cert. Record p. 391.)

The uncontradicted positive evidence in this record shows that an annual license fee in any of the amounts above indicated would be prohibitive and would prevent the continuance of the business (Cert. Record pp. 181-182,

245-47). There is not a word of evidence in this record to support the finding to the contrary by the court below.

(2) The assertion of general application of the ordinance to all business in the same general classification, is true in so far as the face of the ordinance is concerned. The undisputed evidence in the record shows that the ordinance was adopted for sole application to the Coalberg in-transit transportation facility, and that there is no other "place or premises" or facility or "business" in the Township of Saddle River to which the ordinance was applicable (Cert. Record, pp. 230, 312). These undisputed facts are shown, not only by this record but also, by the findings of two court decisions in this litigation, *Independent Warehouses, Inc.* v. *Township of Saddle River*, 52 Fed. Supp. 96, 96-97; *Independent Warehouses, Inc.* v. *Township of Saddle River*, 132 N. J. L. 390, 392 (Cert. Record, p. 390). Those facts and findings were not disturbed or criticized by the court below.

Pertinent to this sub-division of Appellees' assertion 5 are the decisions in *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, at page 294, from which a quotation is above given under point 4 and *Nippert* v. *City of Richmond*, 90 L. ed. Adv. Op. 496, at pages 501-502; U. S. . . , in which this very contention was overruled.

In *Sproul* v. *South Bend*, 277 U. S. 163, the court criticized the license fee of $50. per year because it was not imposed as an incident, or to defray the expenses, of municipal regulation, and because it was not shown "that the amount collected under the ordinance was no more than was reasonably required for such a purpose." Then the Court said (pp. 169-170):

"It follows that the exaction of the license fee cannot be sustained as a police measure."

* * * * * * * *

"It follows that on the record before us the exaction of the license fee cannot be sustained either as an inspection fee or as an excise for the use of the streets of the city."

That decision, the *Crew Levick* case, the *Nippert* case, and many others above cited, show that Appellees' assertions in point 5 involve Federal questions within the express jurisdiction and particular function of this Court to consider and determine on review of judgments of state courts.

Appellees cite, in support of their assertions in Point 5, the case of *Mackay T. & C. Co.* v. *Little Rock*, 250 U. S. 94. That case involved a municipal ordinance to license telephone poles and cables—poles at 50¢ each and cables at rate of 4 poles per block. The total amount of the tax involved 205 poles at 50¢ each for 4½ years, or $461.25 (pp. 96-97). This was not a tax on the privilege of doing business, but a franchise tax for the use and occupancy of the public streets. No mention is made in the opinion of other property taxes upon the pole line.

It was a general ordinance applicable to all telephone lines. There were two other telephone companies in the city (p. 98), and the tax was the same as to all. The ordinance had been accepted in writing as a contract between the company and the city (p. 96).

The court said (p. 98):

"We are unable to see ground for dismissal of the writ of error, and will pass at once to the merits."

The state Court treated the license fee as a license tax and this Court so regarded it (p. 98).

No question was raised under the commerce clause of the constitution, hence, the Court stated that it was not at liberty to revise the decision upon the question of construction but could only determine whether as construed and applied the ordinance deprived plaintiff of rights secured by other provisions of the constitution and laws of the United States (p. 99).

The Court held that a reasonable tax upon the maintenance of poles and wires erected and maintained by the telegraph company within the city limits pursuant to authority granted by its ordinances, is not an unwarranted burden upon interstate commerce and does not infringe rights conferred by the Act of Congress (p. 99).

It held that the city may impose such taxes not merely with respect to the special and exclusive occupancy of streets and other public places by poles and other equipment (under franchise granted by the city), but also by way of compensation, for the special cost of supervising and regulating the poles, wires and other fixtures and in issuing the necessary permits.

The Court held that there was no support in the record for the contention that the tax of 50¢ per pole per year was unreasonable, or that the telephone company was subjected to unreasonable discrimination in contravention of the equal protection clause of the 14th Amendment (p. 100).

The Court held that there was no offer to show an arbitrary and an intentional unfair discrimination in the administration of the ordinance, and that there was no offer to

show discrimination in the application of the tax as among the three telephone companies who maintained pole lines under the ordinance.

In all respects above mentioned the *Mackay* case differs from the facts and issues in the present case.

Conclusion.

For the above reasons it is respectfully submitted that an order noting probable jurisdiction should be entered and that the motion to dismiss the appeal, and the alternate motion to affirm the judgments of the court below, should be denied.

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Service of the foregoing Brief is hereby acknowledged this 15th day of April, 1946.

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FILE COPY

IN THE

Supreme Court of the United States

No. 83, October Term, 1946.

INDEPENDENT WAREHOUSES, INC., PENNSYLVANIA COAL COMPANY and ERIE RAILROAD COMPANY,
Appellants,

vs.

WILLIAM SCHISCLE, Recorder of the Township of SADDLE RIVER, and the TOWNSHIP OF SADDLE RIVER, a municipal corporation of the State of New Jersey,
Appellees.

JAMES THOMPSON,
Appellant,

vs.

SAME
Appellees.

ON APPEAL FROM THE NEW JERSEY COURT OF ERRORS AND APPEALS

APPELLANTS' BRIEF.

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ARGUMENT 46

I. The ordinance requires the obtaining of a license and the prepayment of a license fee as a condition precedent to the right of appellants, to conduct an instrument of transportation service in interstate commerce, and imposes taxes, regulations, instructions, and burdens upon interstate commerce, in violation of the commerce clause of the constitution of the United States and the Interstate Commerce Act 46

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II. The license fee prescribed by the ordinance is arbitrary, unreasonable, discriminatory; and prohibitory, and deprives appellants, and each of them, of their property without due process of law; denies to them equal protection of laws; and denies to them their privileges and immunities as citizens of the United States, in violation of the fourteenth amendment of the Constitution of the United States 106

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III. The ordinance is indefinite, uncertain, arbitrary, unreasonable and unlawful; (a) as to the amount of the license fee; (b) as to the discretionary power it purports to confer upon the members of the municipal governing body, and its officers and agents, and thereby denies to appellants the equal protection of the laws, in violation of the fourteenth amendment of the Constitution of the United States 137

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V. The New Jersey Court of Errors and Appeals erred in reversing the judgment of the New Jersey Supreme Court, and in affirming the judgments of conviction of appellants, Independent Warehouses, Inc., and James Thompson, by William Scheele, Recorder of the Township of Saddle River 160

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IN THE

Supreme Court of the United States

No. 83, October Term, 1946.

Independent Warehouses, Inc., Pennsylvania Coal Company and Erie Railroad Company,
Appellants,

vs.

William Scheele, Recorder of the Township of Saddle River, and the Township of Saddle River, a municipal corporation of the State of New Jersey,
Appellees.

James Thompson,
Appellant,

vs.

Same
Appellees.

APPELLANTS' BRIEF.

(1) Opinions delivered in the Courts below.

The opinions delivered in the Courts below are officially reported as follows:

United States District Court for the District of New Jersey, *Independent Warehouses, Inc., et als* v. *Township of Saddle River*, 52 Fed. Supp. 96; New Jersey Supreme Court, *Independent Warehouses, Inc., et als* v. *Scheele, et al., and James Thompson* v. *same defendants*, 132 N. J. L. 390; New Jersey Court of Errors and Appeals, *Independent Warehouses, Inc., et als.* v. *Scheele et al.*, and *James Thompson* v. *same defendants-appellants*, 134 N. J. L. 133.

(2) Grounds of Jurisdiction.

The ordinance in question, adopted January 25, 1943, is printed at pages 9-11 of the record. Section 1 (R. 9) forbids any person, firm or corporation to conduct or carry on, within the Township, the business of the storage of personal property in a warehouse engaged in storing goods for hire or work in, occupy, or, directly, or indirectly in any manner whatsoever, utilize any place or premises in which is conducted or carried on the storage of personal property in a warehouse engaged in the business of storing goods for hire, unless and until there shall be granted by the the Township Committee of the Township of Saddle River in accordance with the terms of this ordinance, and shall be in force and effect, a license to conduct said business for the place and premises in or at which said business shall be conducted or carried on.

Section 2 (R. 10) requires a written license application to be filed with the Township Committee, setting forth the name and address of the applicant, the kind or character of personal property to be stored, the location of the place and premises in or at which the business is to be conducted, the total area of the ground space thereof and a diagram of the same. Said application shall be accompanied by a deposit to cover the license fee for the current year in the amount thereinafter provided.

Section 3 (R. 10) prescribes an annual license fee to be computed on the basis or rate of three-quarters (¾) of a cent for each square foot of the total ground area of the place or premises in or at which said business is conducted or carried on. Said license shall expire on January first of

each year, and the license fee is required to be payable in advance for each year or part thereof, and is expressly declared to be imposed for revenue. The Township Committee is empowered to revoke any such license for sufficient cause after notice and hearing.

Section 7 (R. 10-11) imposes, for violations, imprisonment in the county jail or in any place provided by the Township for the detention of prisoners, for a term not exceeding 90 days or a fine not exceeding $200., or both. In default of payment of any fine, the magistrate is empowered to imprison the convicted person for any term not exceeding 90 days, and to issue execution against the goods and chattels of any convicted person, firm or corporation, to be levied and enforced in the same manner as are executions from a small cause court. Section 7 also provides that each day that a violation of any of the terms or provisions of the ordinance shall continue shall constitute a separate offense.

Independent was convicted on November 30, 1943, before the Recorder of conducting a storage business for hire "at a certain place called Coalberg, appearing on the Assessment Map as Block No. 106-D", without first having obtained a license and prepaying an annual license fee, as required by section 1 of the ordinance (R. 6-9).

Appellant, James Thompson, an employee, was, on the same day, convicted before the Recorder, on the charge that he "worked in, occupied or utilized" the same premises for which his employer had failed to obtain a license, and prepay the license fee, for the conduct of that business (R. 14-15).

For such violations, Independent was fined $200., and execution was directed to issue against its goods and chattels for the collection of the fine (R. 12). James Thompson was fined $200, and in case of default of the payment thereof he was ordered to be imprisoned in the county jail for a term of 90 days (R. 15).

The "place or premises" specified in the convictions (Block 106-D on the Assessment map) contains an area of 2,730,296 square feet. The annual license fee on that area, at ¾ of a cent per square foot, would be $20,475., which is the exact amount of the assessed valuation of that entire tract of land for 1943 (Ex P-2, R. 18, 76).

The grounds of contest are that said convictions, and the ordinance as applied to the Coalberg Storage Plant were unlawful because:

(a) The place or premises, and the business conducted by Independent, and in which James Thompson was employed, constituted an instrument exclusively used for the transportation of interstate commerce, and that said convictions, and said ordinance, imposed regulations of, and undue burdens upon, interstate commerce, in violation of the Commerce Clause of the Constitution of the United States and the Federal Interstate Commerce Act.

(b) The ordinance was arbitrary, unreasonable, discriminatory and prohibitive, and denied appellants their rights and privileges in violation of the Fourteenth Amendment of the Constitution of the United States.

On May 27, 1946, the Court entered its order noting probable jurisdiction and referring the case to the summary docket.

Statement of Jurisdiction.

(a) Appellate Jurisdiction.

Appellate jurisdiction is conferred upon the Court by section 237 (a) of the Judicial Code *(28 U. S. C. A., sec. 344 (a))* reading as follows:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, * * * or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. * * * The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

Section 861a of 28 U. S. C. A. provides:

> "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

Section 861b of 28 U. S. C. A., provides:

> "The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, * * *, shall be applicable to appeal which section 861a of this title substitutes for a writ of error."

The judgments involved in this case are final judgments of the New Jersey Court of Errors and Appeals, which is the highest court of the State of New Jersey in which a decision in this suit could be had. Article VI, Section I, paragraph 1, of the New Jersey Constitution provides:

> "The judicial power shall be vested in a court of errors and appeals in the last resort in all causes, as heretofore; * * *."

These actions drew in question the validity of an ordinance of the Township of Saddle River, a municipal corporation, and subdivision, of the State of New Jersey, (R. 12-17). In *King Mfg. Co.* v. *Augusta,* 277 U. S. 100, 114, this court held that a municipal ordinance "is a statute of the state within the meaning of the jurisdictional provision," of section 237(a) of the Judicial Code (p. 102).

The validity of that ordinance was drawn in question on the ground of its being repugnant to the Commerce Clause, Article 1, section VIII, clause 3 of the Constitution of the United States, and section 1, paragraphs (1) to (6), inclusive, and section 6, paragraphs (1), (3) to (7), inclusive, and (10) of the Interstate Commerce Act (*Title 49, U. S. C. A.*) (Reasons (d), (e), R. 16; Assignment of Errors, paragraph 2, R. 281), and also repugnant to the Fourteenth Amendment, Article XIV, Section 1, of the Constitution of the United States (Reasons (b), (c), (l), (m), R. 16, 17); Assignment of Errors, paragraphs 3, 4 and 5, R. 283-285).

The decision of the Court below is in favor of the validity of said ordinance (R. 265-274).

(b) Substantial Federal Questions.

The Federal questions, and their nature, substance, and effect, are set forth in paragraphs 5 to 14, inclusive, of the Appellants' Statement of Jurisdiction filed herein, and under Points 1 to 5 inclusive (pp. 1-33) of Appellants' brief, filed herein on April 11, 1946, answering Appellees' Statement Opposing Jurisdiction. They are more fully set forth and discussed under the appropriate points of the argument in this brief.

This case does not involve a tax levied directly upon property of any kind, under any law of the State of New Jersey. On the contrary, it involves an unlawful attempt, by a single municipality, to impose a local license, or excise, tax upon, and to regulate, the right of an interstate common carrier to operate facilities, and perform storage-in-transit services, as an integral part of the transportation of coal moving exclusively in interstate commerce, as defined and authorized by the Interstate Commerce Act (49 U. S. C. A., Sec. 1, (3), (a)), and which facilities and services are within the exclusive jurisdiction of the Interstate Commerce Commission, under that Act.

STATEMENT.

(3) The Nature of this Appeal.

This case is before the Court on the joint appeal (R. 280) from judgments of the New Jersey Court of Errors and Appeals, in the two cases, respectively entitled on the cover of this brief, which arose from the same controversy,

were heard on a joint record before the Recorder (R. 15); the New Jersey Supreme Court (R. 17-18) and the Court below (R. 62), and were decided together in a joint opinion in each of the two last mentioned courts (R. 253-257, 265-274).

(4) References.

For convenience, references herein will be: "Independent" refers to Appellant, Independent Warehouses, Inc.; "Coal Company" refers to Appellant, Pennsylvania Coal Company; "Erie" refers to Appellant, Erie Railroad Company; "Recorder" refers to Appellee, William Scheele Recorder of Saddle River Township; "Township" refers to Appellee, Township of Saddle River, a municipal corporation, or sub-division, of the State of New Jersey located in Bergen County; "Court below" refers to the New Jersey Court of Errors and Appeals; "I. C. C." refers to the Interstate Commerce Commission; "Coalberg" refers to the property and facilities in the Township provided by Erie, and used and operated by it, with the aid of contract agents, exclusively for the storage-in-transit, and servicing, under tariffs filed with I. C. C., of anthracite coal moving in interstate commerce over through routes and at through, or joint through, rates from the mines in Pennsylvania to destinations in other states; "Coalberg Tax case" refers to the litigation over coal taxes decided in *Pattison & Bowns* v. *Township of Saddle River, et al*, 129 N. J. L. 135, *aff.* 130 N. J. L. 177.

(5) Correlative Litigation.

Because of its important relation to the enactment of the ordinance involved in this litigation, it is pertinent to refer here to the Coal Tax case, in which the Township assessed for taxation, for the years 1940 and 1941, and levied local personal property taxes against Pattison & Bowns, and a number of other coal companies, who were the owners of coal stored at Coalberg under the Erie tariff involved in the present case.

Those assessments and taxes were set aside on the ground that the coal was in a commercial storage, and was exempt from taxation under a section of the New Jersey tax laws (*R. S. 54:4-3.20*) reading as follows:

> "All personal property stored in a warehouse of any person, co-partnership or corporation engaged in the business of storing goods for hire shall be exempt from taxation under this chapter."

Pattison & Bowns v. *Township of Saddle River, et al*, 129 N. J. L. 135, *aff.* 130 N. J. L. 177.

(6) History of the Present Litigation.

On April 19, 1943 this ordinance was attacked by complaint, filed in the United States District Court, District of New Jersey, against the Township of Saddle River, by Independent Warehouses, Inc. (Pennsylvania Coal Company and Erie Railroad Company, interveners) praying for injunction to restrain the enforcement of the ordinance on substantially the same grounds as those urged in this case. A temporary restraint was issued pending hearing of a

motion for preliminary injunction against the enforcement of the ordinance. After that hearing the court entered an order on November 23, 1943 denying preliminary injunction on the basis of a memorandum opinion, of October 11, 1943, holding that the license fee was a tax imposed by or pursuant to the laws of the state, and that the court was deprived of jurisdiction to grant a preliminary injunction by Title 28 U. S. C. A., section 41, because the courts of New Jersey afforded "a plain, speedy, and efficient remedy at law or in equity." *Independent Warehouses, Inc.* v. *Saddle River Township*, 52 Fed. Supp. 96.

Thereafter, on November 30, 1943, Independent and James Thompson, were arraigned, and convicted, before the Recorder for violation of said ordinance (R. 6-9, 14) as above set forth.

The laws of New Jersey provide:

(R. S. 2:81-8) "When a writ of certiorari is brought * * * to review the proceedings of any special statutory tribunal, * * *, the court shall determine disputed questions of fact as well as of law, and inquire into the facts by depositions taken on notice or in such other manner as may be according to the practice of the court.

* * * The court may reverse or affirm, in whole or in part, such * * * order or proceeding, finding or determination, * * *."

(R. S. 2:81-13) "All judgments or other judicial proceedings of any city judge, police court or other court of inferior jurisdiction had for or on account of a violation of any city ordinance, * * *, whether had with or without jury trial, shall be reviewable by certiorari in accordance with the rules and practice of the supreme court * * *."

Pursuant to said statutes, and in accordance with the rules and practice of the state Supreme Court, appellant, Independent (R. 1), the Coal Company, Erie (R. 2), and James Thompson (R. 1) were allowed writs of certiorari to review in the state Supreme Court the convictions of Independent and James Thompson before the Recorder (R. 6-9, 14).

The state Supreme Court reviewed said convictions upon the returns to the writs made by the Recorder (R. 2-15), the joint record of the evidence taken by depositions on behalf of the parties (R. 18-252), and the "Reasons" filed by the prosecutors (R. 13-17). By stipulation of the parties (R. 17) the proceedings on said writs were presented to the state Supreme Court, and briefed and heard together, on said joint record.

The state Supreme Court filed its joint opinion (R. 253-257) reversing said convictions, and holding that the ordinance in question was invalid as applied to Appellants' business at Coalberg because the ordinance attempted to impose regulations and taxes upon a business that was exclusively interstate commerce, in violation of the Interstate Commerce Act, and because the ordinance was an unreasonable, arbitrary, capricious and discriminatory exercise of the licensing power (R. 256).

On Appellees' (here) appeal, the Court below filed an opinion (R. 263-274) and entered judgments (R. 275, 276) reversing the findings and judgments of the state Supreme Court. The judgments of the Court below are before this Court for review on appeal (R. 280).

(7) The Coalberg Plant.

In 1901 the Coal Company acquired three separate and unconnected parcels of land, aggregating 67.25 acres, in the Township (R. 80, 86) to provide a location convenient to tidewater markets for the storage of excess production of coal during certain seasons of the year, in readiness for deliveries in winter months when the demand normally exceeds production and for emergencies caused by mining or transportation interruptions, bad weather or other conditions (R. 81).

Exhibits P-1 (R. 18A, 64) and P-2 (R. 18, 76) show the following facts and information respecting these three parcels of land as of 1943, when the ordinance was enacted and Independent and James Thompson were convicted of its violation. Block and lot numbers are those shown on the Assessment Maps of the Township.

Information	Block 106-D		Block 106-E	Block 102. Lot 1
Assessed areas (sq. ft.)	1,365,148	1,365,148	90,910	108,900
Total Area (sq. ft.)	2,730,296			
Assessed val. per sq. ft.	1¢	½¢	½¢	¾¢
Assessed value (Land)	$13,651.	$6,824.		$ 817.
Av. Ass'd val. per sq. ft.	¾¢		½¢	¾¢
Total ass'd val. Land	$20,475.		$ 455.	$ 817.
Improvements	$113,400.		None	None
Area occupied and used (Sq. ft.)				
Railroad Trks.	462,350			
Storage plant	1,198,500			
Total used area (sq. ft.)	1,660,850		None	None
Vacant unused Area (sq. ft.)	1,068,750		90,910	108,900
License fee ¾¢ per sq. ft.	$ 20,475.		$682.50	$ 817.00
Total taxes on land & imp. levied by Tp.		$7,770.98		
Track areas (sq. ft.)				
Storage plant primarily	107,240			
N.Y.S.&W.R.R. exclusively	188,055			
Joint Plant & N.Y.S.&W.	167,055			
N.Y.S.&W. trackage rights	462,350			

On Block 106-D the coal company constructed storage and handling facilities at Coalberg, including 12 platforms or "floors" for coal piles, pump houses, locomotive house (R. 71-72), power lines (R. 73, 128) with 42 distribution poles (R. 129), engine houses (R. 74, 128), car hauling equipment (R. 129), lighting facilities (R. 75), boiler house, machinery, electric motors, water tank (R. 159-160), loading towers (R. 160), loading chutes (R. 161-162), and tracks (Exs. P-2, R. 18, 76, P-3, R. 19, 76), coal hoppers, track scales, direct track connections with Erie and New York, Susquehanna and Western railroads, and indirect track connections with other railroad lines, and other component parts of a coal storage yard, or plant (Ex. P-1, R. 18A, 64). These facilities and structures are solely adapted to the storage and handling of anthracite coal transported in and out by railroad (R. 85).

(8) Operation of Coalberg Plant.

Prior to February 25, 1939 (R. 85, 109, 127, 128) the Coalberg storage facilities were operated under lease by Pattison & Bowns, and other coal sales companies, as their own private storage place for coal intermediate between the mines in Pennsylvania, where they purchased the coal, and ultimate delivery points. Taxes were assessed and paid on the stored coal as local private property (R. 77, 85).

Effective February 25, 1939, the Coalberg storage plant was surrendered by the lessees, and taken over by Erie and thereafter operated under the following contractual set-up:

(1) July 10, 1939, Agreement between Erie and the Coal Company (Ex. P-4, R. 20, 83) confirms, and commits to writing, an arrangement of February 25, 1939 for operation of the Coalberg plant, for the benefit of, and at the sole expense (including taxes), of Erie, as a public service transportation facility, available to all shippers, for in-transit storage and handling of anthracite coal moving in interstate commerce from Pennsylvania under through routes, at through, or joint through rates, under duly published tariffs, filed with the Interstate Commerce Commission (R. 110), under the provisions of the Interstate Commerce Act. This change in the operation purpose and nature of the Coalberg facilities on February 25, 1939 is shown by Exhibits P-4 (R. 20, 83), P-5 (R. 24, 83), P-6 (R. 28, 84), P-7 (R. 32, 84), and described at R. 83-84, 109, 128, 155; P. 12 (R. 54-58, 110). Coalberg was constituted a regular freight station conducted under the supervision of an Erie agent stationed at the plant (R. 113, 125), who collected the freight and storage tariff charges for Erie (R. 96, 127). The objects stated in the contract include:

(a) Provision of in-transit storage for coal of shippers over Erie, and participating, or connecting, railroad companies.

(b) Avoidance of the diversion of coal shipments to competing railroad lines where similar storage facilities were available (R. 109, 113, 124).

(c) Enabling shippers to finance their coal purchasers through the issuance of negotiable warehouse receipts.

(2) June 20, 1939, Lease from the Coal Company to Independent of the Coalberg plant and facilities at the nominal rental of $1.00 (Ex. P-5, R. 24, 83).

(3) June 20, 1939. Contemporaneous agreement between the Coal Company and Independent (Ex. P-6, R. 28, 84), for rendering the services of a public storage warehouse, and the issuance of warehouse receipts, for coal tendered for storage-in-transit in the accomplishment of the above mentioned transportation objects. A specified fee of 2¢ per ton of stored coal (with an annual minimum of $600.) was provided as compensation to Independent for the warehousing service. The entire expense of operation (including taxes) was to be paid, initially by the Coal Company, but ultimately, by Erie. Receipts from shippers for the issuance of warehouse receipts was to be credited on account of this warehousing service and any excess of revenue from warehouse receipts belonged to Independent.

(4) May 24, 1940: Supplemental Agreement between the Coal Company and Independent (Ex. P-7, R. 32, 84), changing the rate to ½¢ per ton and the guaranteed minimum to $500., as compensation to Independent.

On January 18, 1938, Erie Railroad Company filed its petition in the United States District Court for the Northern District of Ohio, Eastern Division, for reorganization under section 77 of the bankruptcy act *(11 U. S. C. A., sec. 205)*, and said petition was approved on the same day.

Trustees of the property of Erie, duly appointed and approved, possessed and operated its property and business, including the establishment on February 25, 1939, of the Coalberg in-transit station and facilities, and the con-

tracts made for that purpose. That property and business was transferred to the reorganized Erie Railroad Company by order number 386, dated December 20, 1941, effective at 12:01 A. M. on December 22, 1941, pursuant to a plan approved by the Interstate Commerce Commission which provided (section D):

> "The reorganized company shall be deemed to have assumed all the contracts of the debtor, * * *, or of the trustees of the property * * *, which shall remain executory in whole or in part upon the consummation of the plan and which shall not have been rejected pursuant to the provisions of section 77".

Re: *Erie Railroad Company Reorganization*, 239 I. C. C. 653; *same case*, 240 I. C. C. 469, 480.

The Coalberg contracts were never disapproved or rejected by the Erie Trustees, but were assumed, and continued, by the reorganized Erie Railroad Company.

(9) Other Functions.

In addition to the in-transit storage function performed for, and at the expense, of Erie, the Coal Company performs in Block 106-D at Coalberg, with part of the same equipment used for the storage plant, the following railroad transportation services for New York, Susquehanna & Western Railroad Company (hereinafter called "Susquehanna");

(a) July 30, 1931. Agreement between Susquehanna and the Coal Company, et als. (Ex. P-9, 40, 85), describes, and provides for the use and maintenance of, 23 switch,

or side, tracks and appurtenances at the Coalberg plant. Certain tracks, occupying an area of 188,055 square feet, are assigned to the exclusive use of Susquehanna. Certain other tracks, occupying an area of 107,240 square feet, are assigned to the primary use of the storage plant. Other tracks, occupying an area of 167,055 square feet, are to be used jointly by Susquehanna and the storage plant, Section Fifth of the agreement provides that Susquehanna has the rights to use any, or all, of the tracks "for general railroad purposes". (R. 125-126). The lengths of, and ground area covered by, those tracks are shown in Exhibits P-1 (R. 18A, 64) P-2 (R. 18, 76) and P-3 (R. 19, 76).

Since the other parties to that agreement surrendered their lease of the plant, and got out of the Coalberg plant in February, 1939, that agreement has been continued as between Susquehanna and the Coal Company (R. 85).

(b) June 12, 1940, Agreement between Susquehanna and the Coal Company (Ex. P-8, R. 36, 85) provides for the use of the Coal Company employees, equipment and facilities for operating pumps and furnishing water from wells on the property for locomotives, and for rendering the common carrier services of billing, weighing and making reports on cars of Susquehanna. Payments for such water and services are deducted from the gross plant operating expense and the balance is paid by Erie as the cost of the transit storage service (Ex. P-10, R. 49, 88).

In March, 1943, ten, but at the time of taking appellants' depositions in this record only six, persons were employed at Coalberg (R. 89).

All of the tracks, facilities and equipment of the Coalberg plant (except the coal storage floors) were used by,

or for the general railroad purposes of freight transfer with connecting carriers, freight classification and holding yard, switching cars to and from storage, watering and servicing locomotives, keeping car records, and other purposes specified in Exhibits P-8 (R. 36, 85) and P-9 (R. 40, 85), and described by the witnesses (R. 125-127, 132, 146-147, 160).

(10) Status of the Parties.

Independent is a corporation of New York, authorized to do business in New Jersey (R. 134). Since June 20, 1939, it has performed warehousing services at Coalberg as the agent of Erie, as a public warehouse for hire, exclusively as an in-transit facility for the storage of interstate shipments of coal (R. 83, 85, 109, 136). As agent of the Erie it had exclusive custody of coal in storage under Erie Tariffs as a public warehouseman, and, when requested to do so, issued warehouse receipts for coal owned by shippers received under railroad waybills (R. 136). Contrary to the statement in the opinion of the Court below (R. 268), Independent is not a subsidiary, but is the contract agent, of Erie.

The Coal Company is a corporation of Pennsylvania and owns and operates mines in the Wyoming region in Lackawanna and Luzerne Counties of that state, for the production of anthracite coal which is all sold and delivered at the mines to purchasers who thereupon become the owners and shippers thereof to various parts of the country (R. 80). All of the capital stock of the Coal Company is owned by Erie (R. 78, 89, 93). The Coal Company holds title to

the Coalberg plant property and provided the employees and equipment for operating the plant (R. 85, 111, 136), solely and exclusively as an in-transit storage facility for shippers of interstate coal under Erie tariffs (R. 80, 83, 109, 112) (except for the above mentioned transportation services rendered for Susquehanna). The coal company owned none of the coal in storage (R. 88, 103, 105, 136, 140).

Erie is a common carrier by railroad in interstate commerce, subject to the Interstate Commerce Act and the jurisdiction of the Interstate Commerce Commission (R. 109). It has the possession and custody, but owns none, of the coal in storage.

(11) Tariff Provisions.

The storage-in-transit services at Coalberg are rendered under, and controlled by, a specific tariff issued, published and filed with I. C. C. pursuant to the requirements of section 1, paragraphs (4) and (6), and Section 6, paragraphs (1) and (4) of the Interstate Commerce Act, hereinafter quoted, or referred to, in part (13) of this Statement.

When these storage-in-transit facilities were inaugurated at Coalberg on February 25, 1939, Erie Railroad Company, Lackawanna and Wyoming Valley Railroad Company, New York, Ontario and Western Railway Company, New York, Susquehanna & Western Railroad Company and Wilkes-Barre and Eastern Railroad Company, had issued, on January 24, 1939 (effective February 25, 1939), a joint and proportional through tariff on anthracite coal moving in interstate commerce, or through rates, or joint through

rates, on through routes and on through billing, and under the original shipping contract, from stations in Pennsylvania on the above mentioned participating railroads, and Delaware & Hudson Railroad Company, to stations in New Jersey, New York and elsewhere in the New York metropolitan area. Said tariff was duly filed with the Interstate Commerce Commission and is known and identified as tariff number "ICC No. D-1390". A revision of that tariff, issued on July 11, 1940 (effective August 12, 1940), was duly filed with the Interstate Commerce Commission, and since its effective date has been in full force and effect, as tariff number "ICC No. D-1438". Since the pertinent provisions of both tariffs are the same, only the second one was offered in evidence (Ex. P-12, R. 54-58, 110).

Those tariffs prescribed uniform through routes and rates over Erie, or joint through routes and rates over Erie and participating, or connecting, carriers above mentioned, and rules and regulations, applicable exclusively for the transportation, in-transit inspection, weighing, unloading, storage, switching, keeping records and handling of coal, at Coalberg, and the reloading, reconsignment, reshipment, or diversion of coal from Coalberg to final destination, under the original transportation agreements of carriage, for all shippers, or owners, of coal moving in interstate commerce over said railroads from tariff stations in Pennsylvania.

The rates, rules, regulations and practices applicable exclusively to the shipment of anthracite coal, etc., to Coalberg for in-transit storage, were contained in the tariffs above mentioned, filed with the Interstate Commerce Commission (Ex. P-12, R. 55-58, 110-111).

They were joint and proportional tariffs covering shipments of anthracite coal, anthracite briquettes and boulets in carloads from various shipping points, al' ı the Commonwealth of Pennsylvania, on the lines of Erie and the participating or connecting carriers above named.

The tariff provides (p. 3, R. 56) that:

> "Shipments of Anthracite Coal, Anthracite Briquettes and Boulets, in carloads, from points of origin on the ERIE RAILROAD, or connecting carriers as named herein, will be accorded the privilege of storage in stock piles of the ERIE RAILROAD at Rochelle Park (Coalberg) N. J., up to the capacity of the Stock Piles, under the following conditions, and at charges as provided in the following rules:"

The rules provided in the tariff (p. 3, R. 56) include the following:

> "(b) *Method of consignment.* Shipments intended for storage should be consigned to the transit party and be billed to the Stock Pile as destination and such information shown on shipping order."
>
> "(c) *Handling charges.* The Erie Railroad charges for handling at Rochelle Park (Coalberg) N. J., which are to be assessed and collected at the time service is performed, will be as follows:
>
> (1) Unloading from cars into Stock Pile 14¢ per ton of 2,240 pounds.
>
> (2) Reloading into cars for reshipment 14¢ per ton of 2,240 pounds."
>
> "(d) *Time Limit.* The period of time allowed for the storage privilege and protection of the

through rate from point of origin to ultimate destination shall be two (2) years from the date of delivery at storage point, as shown on the inbound freight (expense) bill. The Erie Railroad reserves the right to require owners to remove their coal at the expiration of the two years period. Any coal which is not reshipped within two (2) years will lose the privilege of being reshipped at the through rates from point of origin to destinations beyond the storage yard and freight charges will be collected on the basis of the local rates in effect on the date same size of coal was originally shipped from the mines to Rochelle Park, N. J. and the local rates applicable from Rochelle Park, N. J. in effect at the time shipment is forwarded from storage to the ultimate destination, plus handling charges as shown in Rule C."

"(e) *Rates Applicable to and from Storage.* Lawfully published rate from point of shipment to the Stock Pile, will be assessed. The balance of the through rate to ultimate destination will be assessed when reloaded and reshipped to final destination.

Shipments from storage will be waybilled at the difference in rate which was in effect in tariffs lawfully published and filed with the Interstate Commerce Commission on date of shipment from the mines to the ultimate destination and the rate collected on the coal when it moved into storage at Rochelle Park (Coalberg) N. J.

If coal is reshipped from Rochelle Park (Coalberg) N. J., to a destination taking lower rate from point of origin than rate collected to Rochelle Park (Coalberg) N. J., the rate in effect on date of shipment from point of origin to Rochelle Park (Coalberg) N. J., will apply." (This paragraph is repeated as part of Rule No. 1, p. 4).

"The rates provided in this tariff to the storage yard do not apply for local delivery. The rate in effect to Rochelle Park, N. J., for local delivery, in accordance with Erie R. R. I. C. C. No. D-1301, Tariff No. G. O. 2223 [illegible], or successive issues thereof, will be charged and collected on any coal that may be taken from storage for local delivery."

"Rochelle Park" (as distinguished from "Rochelle Park (Coalberg)") is a local railroad station in the municipality of Rochelle Park, which adjoins the Township of Saddle River where the "Rochelle Park (Coalberg)" station is located (R. 243).

The tariff (p. 3 R. 56) provides for the performance by Erie of certain additional services while the coal is in its possession for storage:

Paragraph (h): Keeping of records.
Paragraph (i): Inspection.
Paragraph (k): Weights.

Paragraph (m) provides (p. 3, R. 56):

"Waybills for all shipments from storage will bear notation 'Accorded Storage Privilege at Coalberg'".

* * * * * *

Rule No. 1 provides (p. 4, R. 57):

"The rates named in this tariff will apply only to Rochelle Park (Coalberg), N. J., when for storage and reshipment. When coal is reshipped the rate applicable will be the balance of the through rate from original point of shipment to ultimate point of destination, as published in Erie R. R. tariffs on file with the Interstate Commerce Commission in

effect on date of initial movement from point of origin."

* * * * * * *

Rule No. 3 (p. 4, R. 57) provides:

"In the absence of specific provisions in this tariff to the contrary, shipments transported under this tariff will be entitled to such allowances and privileges and subject to such charges, rules and regulations of originating carriers parties to this tariff, for property while in their possession, and of any of the intermediate or delivering carriers parties to this tariff, for property while in their possession, as are provided in tariffs lawfully in effect and on file with the Interstate Commerce Commission as to interstate traffic * * *, for Terminal or Transit Privileges or Services, including also * * * Diversion, Elevation, * * *, Loading, * * *, Reconsignment, * * *, Stop-off, Storage, Switching, Transfer, Transit Privileges, Unloading, Weighing."

The tariff (p. 5 R. 58) prescribes the rates for transportation of coal from stations in Pennsylvania designated therein, with stop-over and other privileges and services mentioned in Rule No. 3, and provides that they are applicable only on coal consigned to Coalberg for in-transit storage (Rule No. 1, p. 4, R. 57).

This tariff complies in all respects with the requirements of Section 1, paragraphs (4), (5) (a), and (6), and section 6, paragraphs (1), (4) and (7) of the Interstate Commerce Act (49 U. S. C. A.) hereinafter quoted, or referred to, in part (13) of this statement.

(12) Storage-in-Transit Services at Coalberg.

Through the contract agencies of the Coal Company as owner and mechanical operator of the plant, and Independent, as a public warehouseman, Erie operates and utilizes the coal storage plant at Coalberg (except for the above mentioned services rendered by the Coal Company to N. Y. S. & W.) solely to provide regular tariff in-transit services available to all shippers for interstate shipments of coal from the Pennsylvania mines to ultimate destinations through and beyond Coalberg, as a regular transportation service facility over its line (R. 109-110), pursuant to the demands of shippers (R. 111-112).

Coalberg was a regular tariff designated freight station, in charge of a regular Erie agent, for supervising the services prescribed by duly filed tariffs (R. 113, 125, 127), and the collection of transportation and storage charges on the coal (R. 96, 127).

All of the tariff charges for the transportation of the coal and for this in-transit service are collected by the carriers directly from the shippers (R. 127), and Erie bears the entire expense of the transit facilities and services (R. 112, 137). An extra charge of ½c per ton is made by Independent upon such coal owners as obtain warehouse receipts from it (R. 135).

The purpose of storage-in-transit of coal is to provide a reserve coal supply, not otherwise available, for winter consumption of large quantities of various domestic sizes of coal, produced during the warmer seasons of the year when production exceeds consumption, and to facilitate the

current financing of purchases, when desired, by negotiable warehouse receipts under the uniform Warehouse Receipts laws. This method of dealing and transportation is an economic necessity, and provides more uniform:

(a) Employment of miners, and the production and marketing of coal at the mines; transportation and expeditious handling during favorable open seasons of the year; transportation revenues to the railroad carriers, and supply of domestic fuel during the heavy consumption period of the winter months when an adequate supply of coal for domestic use could not otherwise be made available to areas of concentrated population, like the New York metropolitan area of approximately ten million population (R. 80-82), and it tends to reduce:

(b) Railroad congestion, and detention of cars and equipment, during the less favorable winter seasons of railroad operation; and the danger of inadequate fuel supplies at critical seasons which sometimes result from interruptions of transportation or mining operations due to bad weather, strikes and other causes within past experience (R. 81-82, 111-112, 120).

For these reasons, and to prevent loss of traffic by one competing carrier to another, since coal transportation and storage rates on all competing railroads are the same (R. 114, 124), it has been, and still is, the practice of all anthracite carrying railroads to provide such in-transit storage and handling facilities, and services, in compliance with the requests of shippers of coal (R. 82, 109, 111-113).

Such in-transit facilities and services are required by shippers, and are, therefore, necessary to the carriers, for

competitive reasons, and the Interstate Commerce Act (49 U. S. C. A. Secs. 1 (3), 1 (4) provide that they be furnished by the carriers upon reasonable request of shippers. Coalberg was the only facility on Erie lines available for in-transit storage and handling of interstate coal shipments (R. 112).

Under the tariff, and practice, purchasers who ship coal from the mines in Pennsylvania designate on the shipping order their directions for in-transit storing and handling at Coalberg (R. 112). The cars are billed to the shipper, or consignee, solely for in-transit storage at Coalberg and the coal is held in the possession of the carrier until ordered out by the owner (R. 136-137). The coal is then reloaded into railroad cars and continues its railroad journey to ultimate destination under the original shipping contract, at the same through, or joint through, rate under which the first leg of its interstate movement began in Pennsylvania. This entire operation is described in the record (R. 113-114, 119, 135, 137, 164).

No coal is sold at Coalberg (R. 163). Saddle River Township, where the Coalberg Plant is located, had a population of 3,169 at the 1940 census. The coal at Coalberg could not be disposed of locally. There was no market there for it. It was not intended for sale at that point. All of the coal stored and handled there was owned by shippers or consignees of coal shipped in interstate commerce from mines in Pennsylvania to ultimate destinations in, or beyond, the New York metropolitan area, with in-transit stop-over privileges at Coalberg (R. 87-88, 136). All of that coal moves in and out of storage by railroad, under filed tariffs governing its through interstate move-

ment. No coal received for storage comes from any shipping point in New Jersey (R. 136-137, 164).

Under the Coalberg storage tariff the coal remains in common carrier possession throughout the storage period and the owners have no control over it except the tariff privileges of diversion, reshipment or reconsignment, uniformly characteristic of all carload shipments of freight by railroad. Coalberg is not a delivery station.

Rule No. 1 (p. 4, R. 57) of the Coalberg Tariff provides:

> "The rates named in this tariff will apply only to Rochelle Park (Coalberg), N. J., when for storage and reshipment. When coal is reshipped the rate applicable will be the balance of the through rate from original point of shipment to ultimate point of designation, as published in Erie R. R. tariffs on file with Interstate Commerce Commission in effect on date of initial movement from point of origin."

The Tariff (paragraph (b), p. 3, R. 56) prescribes a special method of consignment at point of origin, namely:

> "Shipments intended for storage should be consigned to the transit party and be billed to the Stock Pile as destination and such information shown on the shipping order."

Paragraph (m) (p. 3, R. 56) provides:

> "Waybills for all shipments from storage will bear notation 'Accorded Storage Privilege at Coalberg.' "

Paragraph (4) sub-paragraph (e) of the Coalberg tariff expressly excludes consignment of coal under that tariff

for local delivery at the Coalberg station. That sub-paragraph reads (p. 3, R. 56):

> "The rates provided in this tariff to the storage yard do not apply for local delivery. The rate in effect to Rochelle Park, N. J., for local delivery, in accordance with Erie R. R. I. C. C. No. D-1301, Tariff No. G. O. 2223-H, or successive issues thereof, will be charged and collected on any coal that may be taken from storage for local delivery." (Ex. P. 12, R. 54-58, 110-111).

The separate freight station "Rochelle Park", (as distinguished from "Rochelle Park (Coalberg)") is located in another municipality adjoining that in which the Coalberg station is located (R. 243) and local deliveries, if any, are governed by a different tariff designated in paragraph (2) (e). There is no evidence of any local deliveries having ever been made from Coalberg.

The traffic operation is conducted thiswise: A shipper purchases a car of coal at the mines in Pennsylvania and ships it to himself, or another, at Coalberg solely for storage according to the shipping order as prescribed by paragraph (a) (page 3) of the tariff. On arrival the transportation charges on the first leg of the entire journey are paid to the Erie freight agent at Coalberg Station. The car is switched to unloading position and the coal is placed in storage. At the consignee's direction, the coal is reloaded and moves out by rail to its ultimate destination under the original shipping contract which covered its movement to Coalberg, and he pays only the balance, if any, of the through tariff rate from point of original shipment in Pennsylvania to final destination.

Hence, the coal moves, pursuant to tariff rates, rules and regulations, under the original shipping contracts (called waybills) from its point of mine origin in Pennsylvania to its final destination in other states at the tariff through rate of from $2.30 to $2.50 per ton, according to size of the coal and tariff conditions (Ex. P-12, 54-58, 110) applicable between those points at the time of the original shipment with a stop-over privilege for storage-in-transit at Coalberg, for which the owner of the coal pays to the railroad company an accessorial (additional) tariff charge of 28 cents per ton. These two tariff charges include the transportation, and the services of inspection, weighing, unloading, storage, switching, keeping records and handling, reloading, and reconsignment, reshipment or diversion (R. 110-111, 113-114; Ex. P-12, Rules 2, 3, 6, R. 57, 110, 113-114, 119, 135, 137, 164).

Exhibit P-17, (R.60, 90), described at R. 89-97, shows the amount of coal, of various sizes, in storage at Coalberg on the first of each month, for 1942, 1943, and eight months of 1944.

The reasons for the storage-in-transit of anthracite coal were explained as follows by the I. C. C. in *Rates for Transportation of Anthracite Coal, 35* I. C. C. 220 (1915);

(p. 224)

> "Since this fuel is produced by separating the mine output into eight standard sizes, all these sizes must be produced at the same time. In certain months of each year, however, the consumption of domestic sizes is greater than in other months, and the market demands for the steam sizes in some months exceed and in other months are less than the

normal production. Therefore, if the collieries operate continuously, some of their product must be stored. In past years, to meet this situation, anthracite was quite extensively stored in the carriers' cars for long periods, for which no demurrage charges were assessed, and some of the carriers constructed large and costly storage plants. These plants were equipped with conveyors, engines, electric machinery, and with structures to cover the coal, and the cost ranged from $23,000 to $600,000 each."

Other parts of the evidence in this record will be hereinafter reviewed in the discussion of the particular points to which they apply.

(13) Interstate Commerce Act Provisions Applicable to In-Transit Facilities and Services.

Applicable provisions of the Interstate Commerce Act as amended (Title 49, Transportation, U. S. C. A.) are as follows (italics supplied to indicate portions relating particularly to storage facilities and services).

Section 1 makes the act applicable to common carriers engaged in interstate commerce. The pertinent provisions of that section are as follows:

"(3) (a) * * *. The term 'railroad' as used in this chapter shall include all * * *, the road in use by any common carrier operating a railroad, *whether owned or operated under a contract, agreement, or lease,* and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all *freight de-*

pots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this chapter shall include * * * all *instrumentalities and facilities* of shipment or carriage, *irrespective of ownership or of any contract,* express or implied, for the use thereof, and all services in connection with receipt, delivery, *elevation, and transfer in transit,* * * * *storage, and handling of property transported.*" * * *.

"(4) It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation *upon reasonable request therefor,* and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; * * * it shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation," * * *.

(5) (a) requires just and reasonable charges "for any *service* rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith" * * *.

(6) "It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable regulations and practices affecting * * * all other matters relating to or connected with the receiving, handling, transporting, *storing,* and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this chapter upon just and reasonable terms * * *."

Section 6 of the Interstate Commerce Act provides:

"(1) Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad * * *. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried * * *, *and shall also state separately all terminal charges, storage charges* * *, *all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates, fares, and charges*, or the value of the service rendered to the passenger, shipper or consignee * * *. The provisions of this section shall apply to all traffic, *transportation, and facilities defined in this chapter*."

(4) Permits the filing of joint tariffs "by several carriers which are parties to any joint tariff" as specified therein.

(7) Forbids carriers to engage or participate in the transportation of persons or property, unless tariffs of rates, fares and charges upon which the same are transported have been filed and published as provided by this chapter.

(10) Provides penalties for failure or refusal of any carrier to comply with regulations and orders of the commission under the provisions of section 6.

Section 15, paragraph (1) (49 U. S. C. A. Sec. 15, (1)) authorizes the commission on complaint, or on its own motion:

> "* * * to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, * * * and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge * * * and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed".

(14) The Nature and Importance of In-Transit Facilities and Services.

Stop-over privileges accorded to shippers for in-transit storage, and many other services, (commonly called "Transit") for commodities moving in interstate commerce over through routes, and at through, or joint through, rates have existed for many years and have become one of the most universal, economic, important and essential parts of the commerce and railroad transportation of the United States. If storage-in-transit services are allowed to be stricken down, or hampered and regulated, by the conflicting regulations and burdens imposed by individual municipalities, the only alternative will be to abolish such transportation services in such localities and return to the primi-

tive transportation practice of allowing stop-overs only under a combination of local rates, which would retard and hamper, if not entirely disrupt, the present flow of interstate commerce, and greatly increase the transportation costs to shippers and consumers throughout the nation. An impressive list of commodities accorded such privileges may be found in "*The Traffic Library*" (Special Freight Services Part III) (pp. 3-11, 18, 20-21, 23, 27, 34, 46, 66, 67, 69); "*Railroad Rates and Regulations,*" Ripley, 1912 (pp. 401-402) and "*Principles of Transportation,*" Johnson, Huebner and Wilson, 1928 (pp. 50-56).

The following are brief extracts from standard publications dealing with in-transit privileges and services, which summarize, with foot-note citations of supporting authorities, the decisions of I. C. C. and the Courts:

The Traffic Library, Special Freight Services, Allowances and Privileges, Part III, The American Commerce Association, Chicago (1916), Transit Privileges and Rules:

(pp. 3-4)

"The first transit privilege in the United States was granted in 1870 by permitting the rebilling and reshipping of grain at Nashville, Tenn., and since that time the practice has become a part of the transportation service of carriers generally throughout the country."

Transit in many cases is beneficial in its application. When it can be applied without discrimination, it results in the better diffusion of business, in giving to rival communities the relative advantages to which they are entitled, and which can be accorded them in no other way, and, generally speaking, in

the application of lower transportation charges. The commercial operations of this country have, in many instances, developed through the enjoyment of transit privileges and the Interstate Commerce Commission has never held that transit was to be condemned in so far as it was beneficial and could properly be applied."

(p. 5)

"While the transit privilege for a long time was deemed to be optional with the carrier and the jurisdiction of the Commission thereof doubtful, the amendment of the Act of 1906 made it clear that the privilege, in its various forms, was a regulation or practice affecting the rate and of which the Commission had jurisdiction."

(p. 9)

"The Commission has held that it is not unlawful for a carrier, as a part of the contract for through shipment, to allow its stoppage in transit for treatment, such as grading, sorting, cleaning, milling, concentration, etc., and its subsequent forwarding to ultimate destination on a proportional or balance of through rate from the initial origin point."

* * * * * *

"Recognition of transit privilege of a legitimate nature, such as 'transfer in transit,' 'elevation,' etc., is now included in first section of the Act, and 'it is clear that the law recognizes elevation as a facility which a carrier may provide for the benefit of its shippers if it finds it to its interest to do so as an inducement for shippers to send their traffic over its line."

Economics of Transportation, Locklin, Business Publications, Inc., Chicago, 1944

(pp. 644-646)

Transit Privileges:

"There are said to be some 300 commodities commonly granted transit privileges. The privilege is of great importance to industries not located at rate-breaking points. The general effect of the practice is to equalize the advantages of location of competing manufacturers, and to facilitate the decentralization of industry.

"The theory of a transit arrangement is that there is but a single shipment from point of origin to final destination with a stop-over privilege. But since two terminal services are performed at the transit point, the cost of the service is increased. Furthermore, additional cost is incurred because of the records made necessary to prevent fraud. For this reason the carriers are permitted to exact an extra charge for the service, although they do not always do so."

"A number of points regarding in-transit arrangements should be noted. Usually the materials moving to the transit point and those moving out take the same rates. When not, the rate applicable is that of the article with the higher rate. The full local rate to the transit point is ordinarly paid when the article moves into the transit point. When the shipment moves out of the transit point the rate applicable is the balance of the through rate from the original shipping point to final destination. The identity of each shipment is not preserved, but in order to get the balance of the through rate on a shipment from the transit point, in-bound billing must be presented for an equivalent amount of tonnage."

The word "transit" which Mr. Justice Frankfurter characterized as "railroad jargon" was recently defined by him in *Board of Trade of Kansas City* v. *United States* (1942) 314 U. S. 534, 537 (rehearing den. 315 U. S. 826):

> "Since the transit privilege is at the core of this litigation, a brief exposition of its mechanics and manipulations becomes necessary. The privilege of transit enables grain to be shipped from point A to point B, there to be stored, marketed, or processed, and later reshipped to point C at a rate less than the combination of the separate rates from A to B and B to C. See Transit Case, 24 I. C. C. 340; *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U. S. 768, 777-79; Locklin, Economics of Transportation (1935) 122-23, 629-31. The shipper pays the local rate on the inbound shipment to the transit point, B in our illustration. A receipted freight bill specifying the point of origin, the rate paid, and other pertinent data, is recorded with the transit bureau as evidence of intention of further transportation of the inbound grain or its equivalent. When the outbound shipment is tendered to the carrier, the freight bill is surrendered in order that the shipper may obtain an outbound rate lower than that which he would otherwise be compelled to pay. The privilege belongs, as it were, to both the grain and its shipper. The benefit attaching to grain shipped into the primary market is commonly so broad that it is transferable not only to another owner of the same grain, but to like grain coming from the same country point.' *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U. S. 768, 778."

The general law of transit is stated in 9 American Jurisprudence, Carriers, Section 236, as follows:

"It appears to be established that carriers may lawfully grant stopover, milling-in-transit, and similar privileges, provided they do not thereby unjustly discriminate between particular markets or individuals, or deviate from the provisions of their tariff schedules. The purpose and effect of transit privileges are to give the benefit of a through rate to shippers where, as a matter of fact, there was not a continuous movement of the shipment and where, in fact, in some cases, there has been a change in the character of the shipment. Under such privileges grain may be milled or otherwise prepared; flour may be blended; cotton may be compressed; lumber may be dressed, and perhaps otherwise manufactured; forest products may be creosoted or otherwise treated; structural steel and other materials may be fabricated; crude oil may be refined; livestock may be stopped off for grazing or to test the market; and in some cases products are stored for the shipper and then reconsigned."

(15) Summary of I. C. C. decisions respecting In-Transit Facilities and Services.

The purposes, incidents and benefits of in-transit storage of, and services to, interstate commerce are represented in the following summary of Interstate Commerce Commission and court decisions, as they appear in the official reports.

Transit privileges are allowed upon the theory that the inbound shipment may be stopped and the identical freight or its product, or its exact equivalent of the same commodity moving into the transit point under the same privilege, may be shipped to ultimate destinations under the

through rate from point of origin. *Anderson, Clayton & Co.* v. *St. Louis & S. F. R. Co.*, 17 I. C. C. 12.

A transit privilege is justified on the theory that the inbound and outbound movements are parts of a single continuous transaction, *In re Reduced Rates on Returned Shipments*, 19 I. C. C. 409; *Capital Warehouse Co.* v. *Director General*, 66 I. C. C. 683, under the through rate applicable from the origin point of shipment, *Boone* v. *United States*, 109 Fed. (2d) 560, 563, and that the inbound commodity will be subject to certain treatment and afterwards moved out under the balance of the through rate *Transit Case*, 24 I. C. C. 340.

Transit privileges contemplate movement of a commodity from its origin to a transit point from which, after milling, storing, or fabricating, the entire carload or its equivalent is transported to the final destination, *Fort Smith & W. Ry Co.* v. *Atchison, T. & S. F. Ry Co.*, 216 I. C. C. 411, 414.

Transit privilege permits stopping of goods at an intermediate point and re-shipment therefrom at a through rate, lower than a combination of local rates otherwise applicable. The transit privilege is of great importance to many shippers, and its necessity has long been recognized. *Propriety of Operating Practices—New York Warehousing*, 216 I. C. C. 291, 349.

Transit privileges rest upon the fiction that the incoming and outgoing transport services, which are physically distinct, constitute a continuous shipment of the identical article from point of origin to final destination, *Substitution of Potatoes at W. T. L. Points*, 237 I. C. C. 47, 53.

Transit is a very general term, applicable to numerous arrangements extended to shippers of basic commodities and the products thereof. It is usually granted at points where proper facilities are available, and to require its discontinuance would impose a hardship on many important industries, *Proctor & Gamble* v. *Alabama & V. R. Co.*, 153 I. C. C. 655. The stoppage in-transit of commodities moving on through billing, at through rates, under a continuous shipping contract, from the point of origin, in and out of the transit facility, to ultimate destination, does not interrupt, or alter, the interstate character of the transportation. *North Packing & Prov. Co.* v. *Director General*, 104 I. C. C. 607; *D. A. Stickell & Sons* v. *P. R. R. Co.*, 151 I. C. C. 364; *State of Texas* v. *Anderson, Clayton & Co.* 92 Fed. (2d) 104, 107.

The Interstate Commerce Commission has exclusive regulatory power over such in-transit storage and service, the rates and regulations pertaining thereto, and the instruments or facilities used for such services. *Board of Trade* v. *Ann Arbor R. Co.*, 39 I. C. C. 643; *Peoria B. of Tr.* v. *Atchison T. & S. F. R. Co.*, 55 I. C. C. 42; *Capital Warehouse Co.* v. *Director General*, 66 I. C. C. 683; *Storage at New London & Thamesville, Conn.*, 190 I. C. C. 213-214; *Am. Warehousemen's Assn.* v. *Inland Waterways Corp.*, 188 I. C. C. 13.

In numerous cases the Interstate Commerce Commission has held that elevation and storage is a part of the transportation which the railroad is required to furnish. *Elevation Allowances at St. Louis & East St. Louis*, 30 I. C. C. Rep. 696; *Elevation Allowances at Kansas City*, 34 I. C. C. Rep. 442.

In *Transit Case*, 24 I. C. C. 340; and *Corp. Com. of Okla.* v. *Abilene & S. R. Co.*, 148 I. C. C. 316, the Interstate Commerce Commission held that transit privileges are now a commercial necessity in most cases.

In re Rates & Charges on Grain and Products, 91 I. C. C. 195, the Commission approved transit privileges as affording wider marketing opportunities. It held that they are of benefit to the carriers, dealers and the public, *Grand R. & I. Ry. Co.*, v. *United States*, 212 Fed. 577, 585, heading (6), cert. denied, 234 U. S. 762; *Blodgett Milling Co.* v. *Chicago M. & St. P. Ry. Co.*, 23 I. C. C. 448, and have cheapened the cost of transportation and probably the cost of manufacture, *Central Yellow Pine Assn.* v. *Vicksburg, S. & P. R. Co.*, 10 I. C. C. 193; *Re Transportation of Wool, Hides and Pelts*, 23 I. C. C. 151.

In *Tex-O-Kan. Flour Mills Co.* v. *Atchison, T. & S. F. R. Co.*, 245 I. C. C. 789, the Commission ordered the establishment of storage-in-transit, holding (p. 793) that, transit arrangements permit manufacturers to serve a wider territory, enable consumers to use products that otherwise would not be available and result in additional tonnage for the railroads.

When transportation is interstate, some of its incidents, such as receipt, delivery, *storage*, demurrage, car service, and weighing, assume an interstate character, *Detroit Coal Exch.* v. *Mich. Cen. R. Co.*, 38 I. C. C. 79.

Transit arrangements in certain instances are of benefit to the shipper, also to the carrier, as they have a tendency to hold traffic to the rails, *Livestock to and from the South*, 253 I. C. C. 241, 270. *Commercial Club of Duluth* v. *N. P.*

Ry. Co., et al., 13 I. C. C. 288 (1908), involved storage of freight in railroad warehouses at Duluth, Minn. and Superior, Wis. The Commission in that case said:

(p. 291)

"Complainant challenges the storage principle as in itself unlawful, and therefore not to be justified by competition. This position the Commission, on the record as made, is not prepared to take. The privilege is not given by the defendant carriers only, nor is it confined to the section of the country in which they operate. No justification exists at this time for condemning a practice in which so many carriers and shippers not parties to the record are interested."

In Re Transportation of Wool, Hides, and Pelts, 23 I. C. C. 151 (1912), involving storage, sorting, grading and handling in transit under joint through rates, the Commission said:

(p. 174)

"Transit is a practice of universal prevalence. There is probably not a railroad in the whole United States handling any considerable amount of business into whose tariffs it is not incorporated."

In the *Transit Case*, 24 I. C. C. 340 (1912), the Commission in its considerations of milling, storage and cleaning of grain and grain products, as representative of transit in general, stated:

(p. 348-349)

"These privileges had grown up, and the Commission found them in full vigor when the act to reg-

ulate commerce became a law. In the earlier cases we hesitated, in the absence of power to regulate transit, to lend our approval to the practice. In fact, many carriers and shippers insisted that the practice be abolished altogether and that flat rates be substituted in lieu thereof. However, today transit has become a practice of such universal prevalence upon all the railroads that it has become as much the duty of this Commission under the law as amended to supervise and regulate these rules and practices as the rates, rules, and practices generally of all interstate carriers."

(16) Specification of Assigned Errors to be Urged.

Appellants will urge the assigned errors as set forth in the Assignment of Errors filed herein (R. 281), paragraphs 2, 3, 4, 5, and 1, (in the order presented in this brief).

(17) Summary of the Argument.

The argument is summarized in the headings of the points, respectively, hereinafter presented in this brief.

ARGUMENT.

I.

The ordinance requires the obtaining of a license and the prepayment of a license fee as a condition precedent to the right of appellants, to conduct an instrument of transportation service in interstate commerce, and imposes taxes, regulations, instructions, and burdens upon interstate commerce, in violation of the commerce clause of the constitution of the United States and the Interstate Commerce Act.

(Assignment of Errors, paragraphs 1 and 2, (R. 281), Statement of Points, paragraph I (R. 287).)

The convictions here involved depend upon the validity of the ordinance in question as applied to the in-transit storage business and facilities at Coalberg. The ordinance forbids any person, firm or corporation to conduct or carry on the business of storing personal property for hire, or work in, occupy or directly, or indirectly in any manner whatsoever, utilize any place or premises in which such business is conducted or carried on, unless and until the Township Committee has granted a license in accordance with the terms of the ordinance (Sec. 1, R. 9).

Section 2 (R. 10) requires a written application for a license, accompanied by a deposit to cover the license fee for the current year. Section 3 (R. 10) requires that:

> "Said license fee shall be payable in advance for each year or part thereof. * * *"

Said ordinance attempts, not only to impose a license tax upon the privilege of conducting the business but also, to authorize the Township Committee to determine the withholding or granting of a license (Sec. 1, R. 9), and to revoke a license once granted, for any cause the Township Committee deems sufficient (Sec. 3, R. 10). Sections 4, 5 and 6 (R. 10) impose inspection and regulations, not only upon the business but also, upon "the place and premises where conducted," and "the manner and conduct of said business."

Hence, it lies within the power of the Township to prevent the business from being conducted at all, and the place or premises from being utilized for that purpose.

Applicants contend that the in-transit storage business, and the facilities and services conducted, as described in the parts (7) to (12) inclusive, and governed by the references given in parts (13), (14) and (15), of the foregoing Statement, and the authorities hereinafter cited, are instrumentalities of transportation used exclusively in interstate commerce and that said ordinance, as applied thereto by the Recorder in said convictions, and by the Court below, imposes unlawful regulations, restrictions, directions and burdens upon interstate commerce, in violation of Article I, section VIII, clause 3, of the Constitution of the United States, and the provisions of the Interstate Commerce Act above quoted, or referred to, in part (13) of the foregoing Statement.

The fact that this ordinance does not purport, on its face, to apply to interstate commerce, does not save it if it, in effect, does so, or if, as here, it is attempted to be

applied to an instrumentality of interstate commerce. For that reason it is not necessary to find the ordinance void *in toto*, but only in its application to the present case. *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 294; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 289-290; *Nippert* v. *City of Richmond*, 90 L. ed. Adv. Rep. 496, 497, 502, 504, U. S. ; *Atlantic Refining Co.* v. *Trumbull*, 43 Fed. (2d) 154, 159.

The Coalberg storage business, facilities and services were established by, and are conducted by contract agencies for the benefit, and at the sole expense (including lawful taxes), of Erie as a part of its interstate transportation business and service as a common carrier, and the ordinance, as applied, imposes taxes, restrictions and regulations therein. The fact that its agent, Independent, and an employee, James Thompson, and not Erie, were convicted of violation of the ordinance, does not affect the merits of Appellants' contentions in this case, since the ordinance, as so applied, would equally affect Erie if it conducted these facilities and services without the aid of contract agents.

The term "railroad", as defined in section 1 (3) (a) of the Interstate Commerce Act, includes 'all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property," "whether owned or operated under a contract, agreement, or lease."

That section defines the term "transportation" as including "all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, • • • transfer in

transit, * * * storage, and handling of property transported. * * *."

In *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 506, 513, the court held that railroads, in order to carry on their business as interstate carriers may contract with others to perform the transportation service which they are under a duty to perform. (Citing cases.)

In exact pertinence to this case, the court said (p. 513):

> "But nothing said here is to be taken as indicating that a carrier may not designate a warehouse as a public freight station and select an agent for its management where a forbidden discrimination is not effected."

See also *United States* v. *Fruit Growers Exp. Co.*, 279 U. S. 363, 368.

A situation almost exactly like that at Coalberg is presented in *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 41. It involved a similar storage-in-transit facility and service, operated, like Coalberg, under contract through a private warehousing company.

In that case the Court considered an order of the Interstate Commerce Commission regulating the services and rates affecting the storage of grain in-transit. The Court found that the greater part, about 9/10ths, of the grain gathered and carried by the railroad passed beyond its terminii in interstate commerce.

The carrier arranged to store the grain at the terminals on its own line in grain elevators for various transportation purposes, and this facility also enabled it to compete with other roads serving the same general territory (p. 44).

The railroad made a contract with the owner of a grain elevator providing a stipulated price per 100 lbs. for the handling, weighing and storage of the grain at the elevators.

Reference is made to the Hepburn act of June 29, 1906, (now section 1(3), Title 49, U. S. C. A.) defining the term "transportation" to include all the instrumentalities and facilities of shipment or carriage irrespective of ownership or any contract for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer, transit, ventilation, refrigeration, or icing, storage, and handling of property transported, and imposing upon the carrier the duty to provide and furnish such transportation facilities upon the reasonable request therefor, and to establish through routes applicable thereto.

Also, to Section 6(1) of that act requiring the carrier to state separately in its schedules all terminal charges and all privileges and facilities granted or allowed, and that such charges shall be no more than are just and reasonable (pp. 44-5).

The Court stated that Congress clearly recognized that such services were services in transportation and were to be paid for notwithstanding the possibility that some advantage might be gained as a result (p. 45).

The court then said (p. 47):

> "As the carrier is required to furnish this part of the transportation upon request • • • there is nothing to prevent his hiring the instrumentality instead of owning it."

See also *Spencer, Kellogg & Sons*, v. *D., L. & W. Co.*, 197 N. Y. Supp. 380, aff. 199 N. Y. Supp. 951, cert. denied 263 U. S. 712.

Similar situations of stockyard companies conducting facilities, as agents of carriers, for in-transit handling, feeding, and storage of live stock shipments were considered, and likewise decided, in *United States* v. *Union Stock Yard & T. Co.*, 226 U. S. 286, 305, and *Stafford* v. *Wallace*, 258 U. S. 495, 516, 517-519-20.

The same principles and ruling as to in-transit storage and handling of cotton appear in *So. Pac. T. C.* v. *Interstate Com. Comm.*, 219 U. S. 498, 520, 522-3.

In *Railroad Ret. Brd.* v. *Duquesne Warehouse Co.*, 326 U. S. 446, involving employees of a similar storage-in-transit facility operated, under filed tariffs, for the carrier by a contract agent (pp. 448-50), the court held that the services rendered by the contract agent were services performed "in connection with the transportation of • • • property by railroad" (p. 449), and "in connection with • • • the receipt, delivery, • • • storage, or handling of property transported by railroad," under the Interstate Commerce Act (p. 449).

For these reasons the New Jersey Supreme Court, referring to Independent, the Coal Company and Erie, held (R. 254):

> "For the purpose of this litigation they have been, and will be, treated as one entity."

The Court below did not disturb that conclusion.

The Coalberg plant has been officially recognized as as interstate transportation facility:

(a) It was included as one of the appurtenances and facilities used in connection (pgf. 1) with, and one of the instrumentalities utilized (pgf. 4) by, Erie Railroad, and the existing contracts and agreements respecting it to which Erie is a party were ordered to remain in full force and effect (pgf. 5), under the President's Executive order of December 27, 1943, taking over the railroads under Federal control (R. 113).

(b) In so far as it affects the status of the convicted employee, James Thompson, the federal Railroad Retirement Act of 1937 as amended by public law 572, July 31, 1946. (Title 45, U. S. C. Secs. 228a-228r; U. S. C. A. Sections 215-228) defines "employer" as follows:

> "any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service * * * in connection with the transportation of * * * property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any * * * individual or body * * * when in the possession of the property or operating all or any part of the business of any such employer:" (Sec. 228a).

The 1946 amendment defines employee as one "rendering on the property used in the employer's operations * * * personal services, the rendition of which is integrated in the employer's operations."

The Carriers Taxing Act of 1937, imposing taxes on carriers and employees (Title 45, U. S. C. A. Sec. 261) and the federal Railroad Unemployment Insurance Act (Title 45, U. S. C. A. Sec. 351), contain the same definition of "employer".

The characteristic services described in these definitions correspond with the definition of "transportation" in the Act to Regulate Commerce (Sec. 1 (3)) above quoted.

In addition to the rulings of I. C. C. and the courts summarized in part (15) of the above Statement, there are numerous decisions of the Interstate Commerce Commission and of this Court holding that in-transit storage facilities and services are instrumentalities of interstate commerce under section 1 (3) of the Interstate Commerce Act, and are within the exclusive legislative jurisdiction of Congress and the exclusive regulatory jurisdiction of the Interstate Commerce Commission, and cannot be regulated or unduly burdened by state or municipal legislation.

A complete review of the history and purpose of Section 1 (3) of the Interstate Commerce Act is given in the opinion of this Court in *United States* v. *Pennsylvania R. Co.*, 242 U. S. 208. That opinion shows that the question of storage-in-transit was placed within the jurisdiction and regulation of the Commission, that the federal government had therefore preempted and completely occupied the field with regard to regulations affecting interstate commerce in these respects, and that they are features of transportation entirely beyond the jurisdiction of the states.

The validity of this transit service as an instrument of interstate transportation cannot be challenged in this pro-

ceeding or in the courts, since such a challenge involves questions of fact, and matters of inquiry, within the primary exclusive jurisdiction of the Interstate Commerce Commission, under sections 2 and 3 (1) and section 6 (7) of the Interstate Commerce Act, (49 U. S. C. A.) *United States* v. *Wabash R. Co.*, 321 U. S. 403, 413.

In *Southern Ry.* v. *Reid*, 222 U. S. 424, the Court said:

(p. 440)

"And transportation means not only the physical instrumentalities, but all services in connection with receipt, delivery, and handling of property transported, and such transportation the carrier must 'provide and furnish upon reasonable request therefor.'"

* * * * * *

"There is scarcely a detail of regulation which is omitted to secure the purpose to which the interstate commerce act is aimed. It is true that words directly inhibitive of the exercise of state authority are not employed, but the subject is taken possession of."

* * * * * *

(p. 441)

"The question is, Where is the control, in the state or Congress, and has Congress acted? That the control is in Congress we have seen; that it has acted is demonstrated by the provisions of the interstate commerce act to which we have referred. As we have seen, schedules of rates, whether the road be single or forms with another a 'through route,' must be established, filed, and published, designating the places. They cannot be changed without permission of the Interstate Commerce Commission, and no carrier is permitted to engage or participate in the

transportation of passengers or property unless the rates for the same have been so filed and published. Criminal punishments are imposed for violations of these requirements, and civil redress of injuries received by shippers is given through the Interstate Commerce Commission. See Robinson *v.* Baltimore & O. R. Co., 222 U. S. 506, post, 288, 32 Supt. Ct. Rep. 114. By these provisions Congress has taken possession of the field of regulation, with the purpose, which we have already pointed out, to keep under the eye and control of the Commission the rates charged and the action of the railroad in regard to them, to secure their reasonableness and to secure their impartial application. The statute of North Carolina conflicts with these requirements. What they forbid the carrier to do the statute requires him to do, and punishes disobedience by successive daily penalties."

The last quoted sentence correctly describes the situation of the railroad company under this ordinance.

Southern R. Co. v. *Prescott*, 240 U. S. 632, 637, defines the duties of the carrier under the interstate commerce act as follows:

(p. 637)

"By the act to regulate commerce (sec. 1) the 'transportation' it regulates is defined as including 'all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.' (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, sec. 8563.) It is made the duty of the carrier 'to provide * * *' such transportation upon reasonable request therefor.' All charges made for 'any service' rendered in such transportation

must be 'just and reasonable.' Section 6 requires that the carrier's schedules, printed as provided, 'shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee.' And it is further provided in the same section, that no carrier shall 'extend to any shipper or person any privileges or facilities in the transportation'—that is, as defined—'except such as are specified in such tariffs.'"

Other cases of similar effect respecting storage, and other in-transit privileges, of interstate commerce are *Cleveland, C. C. & St. L. R. Co.* v. *Dettlebach*, 239 U. S. 588, 593-5; *Central R. Co.* v. *United States*, 257 U. S. 247, 257 and *So. Pac. Term. Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 526.

The New Jersey Supreme Court, which is the statutory trier of the facts (R. S. 2:81-8, quoted in part (6) of the foregoing Statement) made the following finding of facts on this record (132 N. J. L. 390):

"The Erie Railroad Company is a common carrier by railroad engaged in interstate commerce." (Op. p. 391, R. 254; 109.)

"The proofs show that the Erie Railroad Company and Pennsylvania Coal Company have entered into a written contract which provides that coal be shipped to and stored at Coalberg as a public facility

for in-transit storage of coal under railroad tariffs under supervision of an Erie agent stationed at Coalberg, who collects freight and storage charges. The purpose of this arrangement is to provide a reserve supply of coal in large quantities produced in slack season and made available when needed in the winter season and to facilitate the financing of the purchase when desired by negotiation of warehouse receipts. It also appears that shippers of coal require these facilities, that it is necessary for carriers to provide them and that the Federal Act to Regulate Commerce provides that they be furnished by the carriers upon reasonable request of shippers. The fact with respect to this coal is that it is all owned by shippers or consignees and is shipped in interstate commerce from the mines in Pennsylvania to the ultimate destination in, or beyond, the New York metropolitan area with in-transit stopover privileges at Coalberg. None of this coal is sold at Coalberg. All of it is transported in and out of Coalberg by rail" (R. 254-255).

"This business was exclusively interstate. It did not cease to be such by reason of the interruption of the shipment for storage purposes at Coalberg. * * * In the instant case the purpose of the in-transit storage was for the economic reasons stated. Coalberg was not its destination. Its journey was simply interrupted for the purpose of storage and not for sale. It being a subject of interstate commerce it is within the exclusive jurisdiction of Congress and the Interstate Commerce Commission. It may not be interfered with by the imposition of this license fee, which we think was upon the occupation or privilege of carrying on such interstate commerce" (R. 256-257).

The facts above recited are, as the Court below states, "not in dispute" (R. 268), but the Court below reached a different conclusion on the question of legal result.

The Court below stated (R. 267):

> "The regulation of foreign and interstate commerce is a subject within the exclusive jurisdiction of the Congress. This control embraces all of the instrumentalities by which such commerce may be carried on. And, while a state possesses the power to tax property having a situs within its confines, whether employed in interstate commerce or not, it cannot impose a tax for the privilege of engaging in such commerce." (Citing cases.)

That statement of the law can be accepted without further citation of supporting authorities.

The Court below stated that the coal was shipped out of storage at Coalberg—

> "to the ultimate destination at the through interstate rate from the point of origin to the new destination, plus reloading charges, 'as a continuance of the original interstate movement,' and the balance is paid by the shipper at Coalberg" (R. 270).

The Court then stated:

> "The inquiry is whether the regulation lays an unconstitutional burden on interstate commerce, or a tax upon an independent local service, preliminary or subsequent to any interstate transportation" R. 271).
>
> "The determinative question is whether there was a cessation of interstate commerce when the

goods were placed in storage at Coalberg for an indefinite period of time; and here it must be resolved in the affirmative" (R. 272).

The Court below rested its reversal of the New Jersey Supreme Court on the question of interstate commerce, upon the conclusion that, because the ultimate destination of the coal is not determined until the owner gives shipping instructions for the outbound movement:

> "Thus the continuity of the carriage in interstate commerce is broken when the carried commodity is unloaded and stored at Coalberg for an indefinite period, subject to the owner's disposal, and thereby the coal becomes intermingled with the general mass of property having a situs within the State, and subject to the State's dominion and liable to taxation as such; and the stored coal retains that character and status until it is again shipped in interstate commerce" (R. 270).

The validity of Appellants' contention under this point depends upon the choice between the directly opposite conclusions of the New Jersey Supreme Court and the Court below on the question of the legal status of the coal during the stop-over period of in-transit storage at Coalberg. Appellants believe, and urge, that, under the law and the undisputed facts of this case, the interstate status of the commerce involved did *not* terminate upon the arrival of the coal for in-transit storage at Coalberg, but that that interstate status continued during the stop-over period and until the final delivery of the coal at ultimate destination, in accordance with the original intent of the shipper and the carrier, and in accordance with the terms of the original

shipping contract and the provisions of the applicable, and controlling, tariff.

The conclusion of the Court below entirely disregarded the controlling tariff, and erroneously considered inbound and outbound shipments as separate and unrelated transactions, contrary to the decisions of I. C. C. and the Courts. The conclusion of the Court below was (R. 267):

> "We are clear that the taxes thus levied do not constitute a direct and undue burden upon and therefore a regulation of interstate commerce in contravention of Article I, sec. VIII, cl. 3 of the Federal Constitution."

In holding that the continuity of the interstate movement can only be interrupted by "natural causes or lack of facilities for immediate transportation" (R. 271), the Court below entirely disregarded the established practice of storage-in-transit as a part of interstate commerce within the definition of Section 1 (3) (a) of the Interstate Commerce Act.

It is true, as the Court below observes (R. 268), that while Coalberg was under lease to, and used for their own private purposes by, Pattison & Bowns before the plant was taken over by Erie on February 25, 1939, as, and tariffs were published for, an exclusively in-transit facility and service for interstate shipments of coal, Independent acted as field warehouseman for Pattison & Bowns and other private owners of coal (R. 158), but the testimony clearly, and uncontradictedly, shows that that service was only a private arrangement for "spot storage" to enable a few private owners to finance their coal purchases (R. 155, 158). Prior to February 25, 1939 there were no in-

transit railroad services rendered at Coalberg and no transit tariffs applicable thereto, and none of the coal was under a protected through rate, or through shipping contract. It was all in the possession of private owners after the original interstate transportation and shipping contract had ended, and the carriers had made final delivery of the coal. The warehouseman was not acting as the agent of the carrier, and the carrier was not operating the facilities.

In support of its above stated conclusion the Court below stated that the coal moved out of storage to its ultimate destination on "a new billing" (R. 270).

The fact that "a new billing," or a reshipment, may occur to cover the continuation of the through interstate journey from point of origin to ultimate destination is not determinative of the question of the interstate status of the stored coal, *Baltimore & O. R. Co.* v. *United States,* 24 Fed. Supp. 734, 735, 736; or the fact that the exact ultimate destination in another state may or may not be known at the time of shipment, *Missouri Pac. R. Co.* v. *Schnipper,* 51 Fed. (2d) 749; *Carson Petroleum Co.* v. *Vial,* 279 U. S. 95, 103-104, *Champlain Realty Co.* v. *Brattleboro,* 260 U. S. 366. It is the original intention of the shippers, of the original shipping contract, and of the tariff covering the shipment, that governs, (Four cases just cited and *Texas* v. *Anderson, Clayton & Co.,* 92 Fed. (2d) 104, 107; Cert. denied 302 U. S. 747, *Baltimore & O. S. W. R. Co.* v. *Settle,* 260 U. S. 166, 171; *Texas & N. O. R. Co.* v. *Sabine Tram Co.,* 227 U. S. 111, 126-127, 130.

In *Baltimore and O. R. Co.* vs. *U. S.,* 24 Fed. Supp. 734, the court considered certain tariffs and rates involving in-

transit provisions for stopovers and services rendered to interstate commerce at Cadosia, N. Y.

The court said (p. 735):

> "A 'transit' is a stop-over privilege granted by a carrier, by which a break de facto in the continuity of carriage of goods is disregarded, and two legs of a journey are treated as though they were covered without interruption. It unites both legs into a 'through route', for which a joint rate can be published. Indeed, while there could be no purpose in allowing a 'transit' without a joint rate, theoretically it would be possible to treat an interrupted carriage as being over a 'through route' by the aid of a 'transit' even when the rates remained a combination of local rates."

* * * * * * *

(p. 736)

> "The reason why such interruptions are held not to break continuity is because of the intent of the parties at the outset to unite all parts of the carriage; and that intent—while not alone conclusive, because no one element is that—is probably the most important single determinant of continuous carriage, and therefore of 'through routes'."

* * * * * *

> "The importance of the publication of a joint rate with 'transit' is that it shows beyond peradventure that the parties do intend so to unite the legs of the journey. The practice antedated the existence of the Commission itself, and has been recognized by it over and over again in instances too numerous to cite. Much of the business of the country is conducted upon the assumption that it is effective to create 'through routes' which would not otherwise

exist, and for the reasons we have just given that result follows on principle."

* * * * * *

"Here it is not material to learn where the methanol is going, but only that it is upon some through route which crosses a boundary of New York. We are therefore free to hold that the 'transit' in this case did create a 'through route', and we think that it did."

No appeal was taken from that decision and it has not been overruled. Other decisions to the same effect, including cases involving precisely the same conditions and practices upon which the Court below based its findings and conclusions above quoted are *North Packing & Prov. Co.* v. *Director General*, 104 I. C. C. 607; *D. A. Stickell & Sons* v. *Pennsylvania R. Co.*, 151 I. C. C. 364; *State of Texas* v. *Anderson, Clayton & Co.*, 92 Fed. (2d) 104, 107, Cert. denied 302 U. S. 747.

In *Gulf, C. & S. F. R. Co.* v. *Texas*, 204 U. S. 403, 412, the Court held that transportation "follows the contract of shipment, until that is changed by the agreement of owner and carrier."

In *Wheelock & Bierd* v. *Akron C. & Y. Ry. Co.*, 179 I. C. C. 517, 520, the entire Commission on rehearing said:

"In *Central R. R. Co.* v. *United States*, 257 U. S. 247, the Supreme Court recognized that transit privileges such as those here before us rest 'upon the fiction that the incoming and outgoing transportation services, which are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destination.' In *Grand Rapids & I. Ry. Co.* v. *United States*, 212 Fed. 577, the court said

that before the benefits of a transit shipment can be accorded some relation must in fact exist between the proposed outbound shipment and an inbound shipment. Practicable transit, especially on grain, could not exist without according to the shipper the right to bill his shipments to the transit point in the first place and subsequently to rebill them or their equivalent to a new and final destination, for the obvious reason that the final destination is not and can not be known at the time of initial shipment. Transit arrangements represent a departure from ordinary transportation service, under which shippers are accorded a more favorable basis of rates than would obtain if the inbound and outbound movements were treated as separate shipments. *Montgomery Cotton Exchange* v. *L. & N. R. R. Co.*, 112 I. C. C. 325, 329. To treat the inbound and outbound shipments as separate and distinct is hopelessly repugnant to the principle of transit, which is that the same commodity, although generally in changed form, which moves to the transit point shall move therefrom to a new destination, and that the shipment from the point of origin through the transit point to destination is the same in principle as if the shipment had moved without transit. *Columbia Malting Co.* v. *N. Y. C. R. R. Co.*, 53 I. C. C. 137. The underlying theory of transit is that of a continuous transportation from the point of origin to the ultimate destination."

More recently, in *Texas Steel Co.* v. *Missouri-K.-T. R. Co.*, 225 I. C. C. 337, 339, the entire Commission on reargument said:

"Transit has long been recognized as the stopping of a commodity for processing or other purposes, and the forwarding of the same, or an equiva-

lent, under an arrangement which by legal fiction ties the inbound and outbound movements together so as to create what, before the law, is a continuous through movement and not two separate movements. Such transit practices have long been permitted with the approval of this Commission and the courts, not only in the structural-steel industry but also in other important industries, including grain, cotton, and forest products, even though there is always an interruption in the physical continuity of the movement at the transit point and generally the ultimate destination of the commodity is unknown when it leaves the first origin. In the case of most commodities, including structural steel, it is impracticable to preserve the identity of the material in and out of the transit point, and in such instances reasonable and proper substitution has always been the practice."

The breakup made by the Court below in the intended continuity of the interstate status of the coal involved, is unlawful under the tariff and the Interstate Commerce Act. This was squarely decided in *Baltimore & O. S. W. R. R. Co.* v. *Settle*, 260 U. S. 166, where the shipper tried to break the intended through movement into two separate legs of the journey; one interstate and the other intrastate, in order to obtain what happened in that case to be a lower combination of the through and local rates. The essence of that decision, with respect to the conclusion of the Court below that the coal ceased to be interstate commerce upon its arrival at the intermediate transit point of Coalberg, appears in the following quotation from that case;

(p. 171)

"In other words, Madisonville was at all times the destination of the cars; Oakley was to be merely

an intermediate stopping place; and the original intention persisted in was carried out. That the interstate journey might end at Oakley was never more than a possibility. Under these circumstances, the intention, as it was carried out, determined, as matter of law, the essential nature of the movement; and hence, that the movement through to Madisonville was an interstate shipment. For neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through interstate shipment. These are common incidents of a through shipment; and when the intention with which a shipment was made is in issue, the presence or absence of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been intended, these incidents are without legal significance as bearing on the character of the traffic. For instance, in many cases involving transit or reconsignment privileges in blanket territory, most or all of these incidents are absent, and yet the through interstate tariffs apply."

The above quoted conclusion of the Court in *Baltimore & O. S. W. R. R. Co.* v. *Settle*, it is supported by the previous decisions therein cited. It is also in accordance with the exhaustive review of the subject of the interstate status of commodities while stopped for in-transit storage and services, and the numerous decisions of this court cited, in the Commission's decisions in *T. Keery Co. Inc.* v. *New York, O. & W. Ry.*, 206 I. C. C. 585, 588-591 (1935); *Same case*, 211 I. C. C. 451, 452-453 (1935); *same case*, 226 I. C. C. 335, 344-351 (1938), which were sustained in the above mentioned decision in *Baltimore & O. Ry. Co.* v. *U. S.*, 24 Fed. supp. 734.

A similar situation, and a similar decision, is found in *Texas & N. O. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, from which the following is quoted (pp. 126-127).

"The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured, and shipped, and to give it a various character by the steps in its transportation would be extremely artificial. Once admit the principle, and means will be afforded of evading the national control of foreign commerce from points in the interior of a state. There must be transhipment at the seaboard; and if that may be made the point of ultimate destination by the device of separate bills of lading, the commerce will be given local character, though it be essentially foreign.

That it is the nature of the traffic, and not its accidents, which determines its character, is illustrated by Railroad Commission *v.* Worthington, *supra* (225 U. S. 101). A rate of 70 cents a ton was imposed by the Commission on what was called 'Lake cargo coal' from a coal field in eastern Ohio to the ports of Huron and Cleveland, Ohio, on Lake Erie, for carriage thence by lake vessels. The shipper transported the coal ordinarily upon bills of lading to himself, or to another for himself, at Huron, and it appeared that the coal might be accumulated in large quantities at Huron, and only taken out of the accumulated lots from time to time for the purpose of shipment out of the state. The rate of 70 cents, however, covered not only the transportation of the coal to Huron, but placing it on the vessels and trimming

it for its interstate journey. It was held that its transportation to Huron was an interstate carriage.

Much stress was laid in the argument upon the fact that the coal was billed only to Huron. Replying to the contention the court said that the billing of the coal was not necessarily determinative, citing Southern P. Terminal Co. *v.* Interstate Commerce Commission, *supra* (219 U. S. 498)."

(p. 130)

"Nor was there a break, in the sense of the interstate commerce law and the cited cases, in the continuity of the transportation of the lumber to foreign countries by the delay and its transhipment at Sabine. Swift & Co. *v.* United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276. Nor, as we have seen, did the absence of a definite foreign destination alter the character of the shipments."

The billing of a shipment does not determine the question as to whether such shipment is an interstate or intrastate movement *Northern Pac. Term. Co.* v. *Spokane, P. & S. Ry.*, 79 Fed. (2d) 773.

A transit service is based on the theory that the transport contract has not been completed and the entire shipment from point of origin through the transit point or points to destination is the same in principle as if the shipment had moved through without transit, *Larabee Flour Mills Co.* v. *Chicago B. & Q. R. Co.*, 223 I. C. C. 55, 64.

As transport and low rates from origin to transit points become parts of the interstate journey, interstate charges are in effect when the products are reshipped through

routes and through rates are maintained, and the commission has jurisdiction. *Routing Cottonseed to Kansas and Missouri*, 231 I. C. C. 775, 779.

In *Stanton & Son* v. *Atchison, T. & S. F. R. Co.*, 258 I. C. C. 315 (1944), the Commission held (p. 317):

> "In proceedings where our jurisdiction is in issue, the actual movements and the real character of the shipments are the determining elements. Neither through billing, uninterrupted movement, continuous possession by a carrier, nor unbroken bulk, is an essential of a through shipment. The manner in which the lumber was handled at the port evidences the intention of the shipper that it was destined beyond the port. The transit rule authorizing storage at the port for a period of 12 months provided an effective means for preserving the continuity of these shipments."

In *Grain Proportionals, Ex-barge to Official Territory*, 246 I. C. C. 353 (1941), the Commission held (p. 378):

> "*Interpretation of the transit rules.*—We have consistently applied the principle that transit arrangements rest upon the fiction that the incoming and outgoing transportation services, which are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destination. *Central P. R. of N. J.* vs. *United States*, 257 U. S. 247. Under transit, there is a movement of a like unit of a particular commodity or its equivalent over a through route at a through rate from point of original shipment to point of ultimate destination".

In *Western Oil Refining Co.* v. *Lipscomb*, 244 U. S. 346, the court set aside a state "occupation or privilege tax"

(p. 347) in a case where the state court, as in the present case, held that the interstate character of the commodity had ceased during a stop-over period, which required a rebilling for the continuance of the transportation. The principles of the cases above cited, and contended for by Appellants in this case, are stated by the Court as follows:

(p. 349):

"On the contrary, it is a case where the shipper intended from the beginning that the transportation should be continued beyond the destination originally indicated, and where there is nothing which requires that decisive effect be given to the bill of lading. Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done, and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one state to another, a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. As this court often has said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive."

* * * * * *

(p. 350)

"Certainly the transportation of the merchandise destined to Mount Pleasant was not completed when it reached Columbia; nor was the continuity of its movement broken by its temporary stop at that place. As to that merchandise the journey to Columbia and the journey from there to Mount Pleasant were not independent, each of the other, but in fact and in legal contemplation were connected parts of a continuing interstate movement to the latter place.

> It results that the tax was imposed for carrying on interstate commerce, and so was repugnant to the Constitution and void."

A part of the conclusion of the Court below was that the coal was stored at Coalberg "for an indefinite period" (R. 270). That statement is incorrect in both fact and law. The word "indefinite" means; "not definite, not defined, not precise, vague, unlimited, indeterminate, uncertain, inexact" (*Cent. Dict. & Encyclopedia*). Diametrically opposite to being "indefinite", the "period" of storage is expressly and *definitely* limited by the controlling tariff and the contract of transportation. Section (d) (p. 3, R. 56) of the tariff (Ex. P-12, R. 56, 110-111) provides a maximum limitation of two years from date of delivery at Coalberg. Exhibit P-17 (R. 60, 90) shows a continual fluctuation in the amount of coal in storage. It comes and goes according to the requirements of the commerce. There is no evidence that any coal ever remained in storage for the full two year period. However, the length of time a given shipment of coal remained in storage, within the two-year limitation, is immaterial in this case.

The Interstate Commerce Act (49 U. S. C. A., Sec. 15, paragraph (1)) confers exclusive original and plenary jurisdiction upon the I. C. C. to regulate and enforce the rates, regulations and practices of the carriers of interstate commerce respecting in-transit facilities and services, *Thompson* v. *Texas Mex. Ry. Co.*, 90 L ed adv op. 886, 894, U. S. In *Storage of Cocoa Beans in New York District*, 231 I. C. C. 575, the Commission approved a tariff provision for a two-year storage period, and the protection of through rates during that period.

It is not disputed that all of the coal arriving at Coalberg for in-transit storage moves by rail in interstate commerce from mines in Pennsylvania, and moves out again by rail, under the original shipping contract and at through, or joint through, rates under this tariff, which applies solely for storage-in-transit purposes at Coalberg. Most of the outbound coal continues as a rail and water movement to New York (R. 112) by way of Edgewater coal docks of the Susquehanna Railroad on the Hudson River (R. 163), where it is dumped into barges and continued to final destination (R. 164). Some of it goes to destinations in the States of Maine and Massachusetts and some to Long Island (New York) (R 163). The yard has had some coal ultimately destined for Bogota and Passaic, in New Jersey (R. 163).

It is immaterial whether some of the coal finds its ultimate destination in New Jersey.

In *United States* v. *Erie R. R. Co.*, 280 U. S. 98, wood pulp was imported to Hoboken, New Jersey, by shipload. Upon arrival the agent of the shipper gave to the terminal company at Hoboken instructions for re-shipment of parts of the cargo; two or three cars at a time, by rail to Garfield, New Jersey, and made out bills of lading, and paid the freight, covering the shipments from Hoboken to Garfield; both in New Jersey.

Although the original shipment was made to Hoboken, the Interstate Commerce Commission ordered Erie and a connecting carrier to establish a through import rate applicable to that movement, on a finding: (p. 101)—

> "that from the time the pulp is placed on board steamers at foreign ports there is a continuing intent

on the part of the shipper that it shall be transported to Garfield."

The carriers contended, and the United States District Court for the District of New Jersey held, on a contest of that order, that the shipments under new local bills of lading from Hoboken to Garfield were intrastate movements.

The decision of the District Court was reversed by this Court, which said:

(pp. 101-102)

"But the nature of the shipment is not dependent upon the question when or to whom the title passes. * * * It is determined by the essential character of the commerce. * * * It is not affected by the fact that the transaction is initiated or completed under a local bill of lading which is wholly intrastate. * * * or by the fact that there may be a detention before or after the shipment on the local bill of lading * * *."

A similar holding appears in *Ohio R. R. Com.* v. *Worthington*, 225 U. S. 101.

In *United States* v. *Union Stock Yard & Transit Company of Chicago* (1921) 226 U. S. 286, 304 in holding that the Chicago Union Stock Yards were engaged in interstate commerce and accordingly subject to I. C. C. regulation, the Court said:

"That the service is performed wholly in one State can make no difference if it is a part of interstate carriage. 'The transportation of live stock,' said this court in *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, in treating of the duties of common carriers, irrespective of the Act to Regulate

Commerce, begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee.' In this connection see *Coe* v. *Errol*, 116 U. S. 517; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498.

"The fact that the performance of the service is distributed among different corporations having common ownership in a holding company which controls an interstate system was held in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission, supra*, to make no difference, where the service to be performed was a part of the carriage of freight by railroad in interstate commerce. Nor does it make any difference that neither the Junction Company nor the Stock Yard Company issues through bills of lading. It is the character of the service rendered, not the manner in which goods are billed, which determines the interstate character of the service." *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission, supra; Ohio R. R. Comm.* v. *Worthington*, 225 U. S. 101.

In *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission* (1911) 219 U. S. 498, it was contended that an I. C. C. order was an attempt to regulate intrastate commerce, in that goods purchased in another state and shipped in interstate commerce to Galveston for export lost their interstate character when, at Galveston, they were processed and manufactured (grinding cottonseed cake). The Court said (pp. 526-7):

"• • • The manufacture or concentration on the wharves of the Terminal Company are but incidents, under the circumstances presented by the record, in

> the transshipment of the products in export trade, and their regulation is within the power of the Interstate Commerce Commission. * * * It makes no difference * * * that the shipments of the products were not made on through bills of lading, or whether their initial point was Galveston or some other place in Texas. They were all destined for export, and by their delivery to the Galveston, Harrisburg and San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the Terminal Company being a part of the railway for such purpose. The case, therefore, comes under *Coe* v. *Errol*, 116 U. S. 517, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have 'actually started in the course of transportation to another State, or been delivered to a carrier for transportation.' "

There is no difference, under the Commerce Clause and the Interstate Commerce Act, between interstate and foreign commerce. Intention has the same relevance and control in either case. *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 295, 296.

The decision of the Court below was based upon the legal conclusion that the storage business to be licensed was "an independent local service" and, therefore, a local incident separate and distinct from interstate commerce. That was the State's contention, and the conclusion of the State Court, in *Nippert* v. *City of Richmond*, 90 L. ed. Adv. Rep. 496, U. S. , which also involved a municipal ordinance for licensing the privilege of conducting a business. In overruling that contention and reversing that conclusion this Court said:

(p. 500)

"If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse, which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involves 'incidents' occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired result.

It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax. This is not to say that the presence of so-called local incidents is irrelevant. On the contrary the absence of any connection in fact between the commerce and the state would be sufficient in itself for striking down the tax on due process grounds alone; and even substantial connections, in an economic sense, have been held inadequate to support the local tax. But beyond the presence of a sufficient connection in a due process or 'jurisdictional' sense, whether or not a 'local incident' related to or affect-

> ing commerce may be made the subject of state taxation depends upon other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce."

One of the supporting cases cited by this Court in *United States* v. *Erie R. R. Co.*, 280 U. S. 98, 101-102, was *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95.

In the *Carson Petroleum* case the same contention was made, and sustained by the state court (p. 10), on a similar factual situation, as above quoted from the opinion of the Court below. The opinion in the *Carson Petroleum* case exhaustively reviewed the cases on both sides of the line of distinction on this question and decided in favor of Appellants' contention on this appeal. The decisions on both sides of the line of distinction on this question were also reviewed in *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 174-176. In the latter case the court said that the first line of cases therein considered "makes it quite clear that a state tax upon the privilege of operating in, or upon carrying on, interstate commerce is invalid" (p. 174). Then follows a specification of the classes of inhibited license, or other, taxes imposed by state or local authorities.

In *Sprout* v. *South Bend*, 277 U. S. 163, the municipal license tax was held invalid as applied to an interstate bus operation. That ordinance, similarly to the ordinance involved in this case, made no distinction between interstate commerce and intrastate commerce (p. 167). The Court held (p. 171):

> "But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account

of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business."

* * * * * *

"A state is equally inhibited from conditioning its exercise (the right to conduct the business) on the payment of an occupation tax." (Bracketed words supplied.)

(p. 172)

"For the ordinance is void because of the imposition of the license fee."

Obviously, the mere storage of the coal at Coalberg, which the Court below held was not interstate commerce, could not exist as a separate business, independent of the transportation functions of which it is an integral, statutory, and inseparable part. It is equally obvious that Appellants could not discontinue the storage feature without withdrawing also from those transportation incidents, within the doctrine above quoted from *Sprout* v. *South Bend*. The combination of interstate transportation and storage in transit are essential to the commerce covered by the tariff, and could not separately exist under that tariff. No *intrastate* coal, is hauled or stored, and no other business is transacted, at Coalberg.

Coalberg is located at the intersection of the railroads of Erie Company (Bergen County R. R.) and the New York, Susquehanna & Western Railroad Company (Ex. P-1, R.

18A, 64), within convenient access to the Edgewater coal docks of the latter company on Hudson River, where most of the outbound coal is dumped from cars into vessels or barges for final destinations in the New York Harbor area and New England (R. 112, 163). The concentration of a convenient supply of anthracite coal for winter fuel is as indispensable to the welfare, health, commerce, and the economic necessities, of the New York metropolitan area, as a full supply of winter firewood in the woodshed of a Maine farmhouse.

During the past half century the interstate commerce of this country has greatly expanded in the volume, importance and the variety of its services to the public. By successive amendments of the Interstate Commerce Act, Congress has correspondingly enlarged the field and detail of Federal control and regulation.

For the past forty years (since 1906) transit facilities and services, including stop-over privileges for concentration and storage-in-transit have been included within the definition of railroads and transportation (Sec. 1(3)(a)) as integral parts of interstate commerce subject to the provisions of the Interstate Commerce Act and regulation by the Interstate Commerce Commission. It has become a universal, important and necessary adjunct of transportation throughout the country for many commodities.

It is inconsistent with the declared policy of Congress and the Interstate Commerce Act to permit local inhibitions, restrictions, regulations and taxes upon the privilege of conducting these important and essential features of a unified, and uniform, national transportation system. If a local municipal government can isolate, interdict, re-

strict and require municipal permission and taxation as a condition precedent to the right to conduct one integrated service of interstate commerce it may extend its control over others. If one municipality may do so, any number of other municipalities may do likewise, by divergent and conflicting restrictions and exactions. In this manner the unity and uniformity of interstate commerce may be hopelessly disintegrated, and its various elements broken into innumerable fragments; each likewise differently interdicted, restricted, regulated, and taxed within the boundaries of each of the multitude of municipal subdivisions of each of the forty-eight states. In such case through routes, through rates and through tariffs on any commodity would become impossible because interstate traffic would be subject to a multitude of inhibitions, restrictions, regulations and license taxes, each differing from the other according to the whim of the governing body of each municipality.

Complete Federal control, and Interstate Commerce Commission regulation, of interstate commerce would be destroyed. This case presents a direct conflict between Federal law and regulation which requires common carriers to provide these facilities, and a municipal ordinance which positively forbids their operation without first obtaining a municipal license, and the prepayment of a tax, for the privilege. Here, as in *Southern Ry.* v. *Reid*, 222 U. S. 424, 442:

> "What they (the municipality) forbid the carrier to do the (Federal) statute requires him to do, and punishes disobedience by successive daily penalties." (Bracketed words inserted.)

This situation resembles the conflict of state and federal authority presented in *First Iowa Hydro-Electric Co-*

operative v. Federal Power Commission, 90 L. ed. Adv. Op. 855; U. S. , where a state statute forbid, without a state permit, the development of a water power project approved by the Federal Power Commission under authority of an Act of Congress. The Court said (L. ed. p. 860):

> "Such a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government.
>
> * * * This would subject to State control the very requirements of the project that Congress has placed in the discretion of the Federal Power Commission".

Quoting from another case, the Court said (L. ed. pp. 869-870):

> "'The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. * * *. It is no objection to the terms and to the exertion of the power that "its exercise is attended by the same incidents which attend the exercise of the police power of the states". The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment'.
>
> It is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon these issues on behalf of the people of Iowa as well as on behalf of all others".

In *Morgan* v. *Virginia*, 90 L. ed. Adv. Op. 982, U. S. , the Court reversed a judgment of the Virginia Su-

preme Court of Appeals which had sustained a state statute challenged on the ground of burdening or regulating interstate commerce.

Appropos of the status of James Thompson as an individual appellant in the present case, the Court held that an individual appellant—

> "* * * is a proper person to challenge the validity of this statute as a burden on commerce. If it is an invalid burden, the conviction under it would fail. The statute affects appellant as well as the transportation company. Constitutional protection against burdens on commerce is for her benefit on a criminal trial for violation of the challenged statute" (L. ed. p. 984);

That case also held:

> "Where uniformity is essential for the functioning of commerce, a state may not interpose local regulation" (L. ed. p. 984);

Obviously, "uniformity" is essential in the regulation of in-transit facilities and services of common carriers generally, and of Erie in particular in the present case, if interstate commerce is to move freely and without conflicting local restrictions. If each municipality along the line of an interstate railroad may lawfully impose its own brand of restrictions and regulations upon such commerce, uniformity would be impossible with respect to any interstate shipment or transportation service.

Unlike the case at bar, where there is an act of Congress expressly governing the in-transit facilities and services involved (49 U. S. C. A. Sec. 1 (3)), there was no act of Congress dealing with the subject involved in *Morgan* v.

Virginia. Nevertheless this Court struck down the state statute in that case on the principle:

> "* * * we must decide the validity of this Virginia statute on the challenge that it interferes with commerce, as a matter of balance between the exercise of the local police power and the need for national uniformity in the regulations for interstate travel" (L. ed. p. 989);

This Court held that the transportation of interstate passengers

> "* * * require a single, uniform rule to promote and protect national travel. Consequently, we hold the Virginia statute in controversy invalid" (L. ed. p. 989);

In the concurring opinion of Mr. Justice Frankfurter, he says:

> "The imposition upon national systems of transportation of a crazy-quilt of State laws would operate to burden commerce unreasonably, * * *" (L. ed. p. 990);

This principle of uniformity of regulations of interstate commerce as essential to the Federal policy of providing an adequate, economical and efficient transportation service, as well as the additional cost imposed by State regulation, was emphasized in *Southern Pac. Co.* v. *Arizona*, 325 U. S. 761, 767, 770, 771, 773, 781, 782, 783.

In that case the Court observed (p. 775):

> "If one state may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation" (p. 775).

Likewise, if the Township of Saddle River, may lawfully tax and regulate, interstate transportation facilities and services of the nature here involved, every other municipality may do so, and they need not prescribe the same, or even similar, regulations.

State License Fees.

Another ground upon which the Court below rested its conclusions was that this ordinance imposed a valid "license or privilege tax or excise" (R. 267), because (a) "a tax for the privilege of exercising a corporate franchise within the state is not obnoxious to the commerce clause," (b) "A tax measured by net profits earned within the state is valid, even though these profits may have been derived in part, or indeed mainly, from interstate commerce," and (c) "A franchise is deemed a part of the corporate property lawfully taxable in the state" (R. 268).

These observations are irrelevant to this case. This ordinance does not purport to impose a tax upon the franchise as property, or upon the privilege of exercising a corporate franchise. It does not impose a tax measured by net profits earned within the state. The amount of the tax has no relation to profits, either gross or net, or to the volume of business done, or the value of the privilege of conducting it.

The ordinance in question provides (Sec. 3, R. 10), and the Court below held, that the license fee is imposed "for revenue" (R. 265).

It is enforcible only by fine and imprisonment. The penalties are cumulative at the rate of $200 fine and 90

days in jail for each and every day during which failure to obtain a license continues. (Sec. 7, R. 10-11).

Each of the three courts that have considered this case have treated the license fee simply as a tax, and a considerable portion of the opinion of the Court below is devoted to sustaining the right of the municipality to impose this tax either upon the property, or the corporate franchises, of Appellants. (R. 266-268, 271-273.)

This ordinance provides that Appellants cannot carry on, or work in, their business, at Coalberg unless and until the Township Committee sees fit to grant a license for that purpose, and they prepay an annual license fee which, according to the construction placed upon section 2 of the ordinance by the Township officials charged with, and who assumed, the duty of enforcing the ordinance, amounts to $20,475. The ordinance *interdicts* the continuance of that business as of the date of the adoption of the ordinance, and at the end of each calendar year, until the tax is paid and the license is granted. At any time the license may be revoked and the paid license fee forfeited, for reasons deemed sufficient by the Township Committee, but not specified or indicated in the ordinance.

This ordinance presents what is, under the facts in this case, a positive barrier, within the sole power of the Township to erect, to the conduct of a business for which this property, taxed on a valuation of $133,875.00, is solely adapted.

Regardless of the taxable situs, or taxability, of the coal in storage, or of any corporate franchise, or any property located within the Township, and in addition to all other taxes, this ordinance purports, unmistakably, to im-

pose a license tax or excise upon the *privilege* of conducting an established legitimate business, and of the privilege of any person to be employed therein.

That business consists solely, and exclusively, of transporting, receiving, storing, handling and servicing interstate shipments of coal and reshipping it to an intended ultimate destination, pursuant to provisions of the Interstate Commerce Act and of a special tariff issued and published for that sole purpose, and duly filed with I. C. C. in accordance with the provisions of that Federal act.

Whether, or not, the coal, while in storage, is locally taxable, the *business* of transporting and storing that coal in-transit and shipping it out to an ultimate destination as originally contemplated by the owner, the shipping contract and the tariff, is a business devoted exclusively to interstate commerce. It is, therefore, an interstate business that is being taxed.

The New Jersey Constitution provides:

> "Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value" *N. J. Const. Art. 4, Sec. 7, pgf. 12.*

Insofar as the Court below attempts to justify this license fee as a tax upon property in any form, including corporate franchises, the ordinance violates that Constitutional provision. But the Court held that a "tax upon the business of warehousemen", and a tax upon "the storage and warehouse business", for revenue "are outside the constitutional limitations" requiring general laws, uniform rules, or taxation according to true value (R. 267). The right to conduct a legitimate business or to be employed

therein, are fundamental property rights guaranteed by the Federal, if not by the state, Constitution. These rights cannot be capriciously exploited "for revenue", which is the sole and "expressly declared" purpose of this ordinance (R. 10).

These cases are not mere tax avoidance cases. All of the property, equipment and facilities at Coalberg were annually assessed and taxed by the Township of Saddle River. For the year 1943 (in which the ordinance was adopted and these actions arose) all of that physical property was assessed against the Coal Company; land Block 106-D, the "Place or Premises" involved in these actions, at $20,475; improvements thereon at $113,400. Taxes amounting to $7,770.98 were levied and paid thereon. (Ex. P-2, R. 18, 75-76.)

Independent and the Coal Company are foreign corporations authorized to do business in New Jersey. Since 1904, such foreign corporations have been taxed directly, and exclusively, by, and have paid their taxes directly to, the state, for the franchise, or privilege, of doing business in New Jersey, pursuant to general laws (*N. J. P. L. 1904, Ch. 221, p. 384*). At the time of the adoption of the ordinance in question (January 25, 1943) the pertinent sections of the tax laws were as follows:

> *R. S. 54:32A-8* (source, *Ch. 25, N. J. P. L. 1937, p. 45*).
>
> "A tax is hereby imposed upon every foreign corporation organized for pecuniary profit, • • • for the privilege of exercising its franchise in this State or for the privilege of doing business or maintaining an office in this State, which tax shall be

measured by, and paid annually upon and with respect to, that proportion of the total capital stock issued and outstanding as of January first in each year as the gross income from the business done in this State in the same income year bears to the total gross income from its entire business in the income year, * * *"

This statute is not applicable to Railroad Companies (R. S. 54:32A-9), whose franchises are separately and exclusively taxable by the state under statutes later quoted herein.

The above quoted statute remained in effect until it was superseded by Chapter 162, (*N. J. P. L. 1945, p. 563*) which contains the following:

"2. Every domestic or foreign corporation * * * shall pay an annual franchise tax * * *, for the privilege of having or exercising its corporate franchise in this State, or for the privilege of doing business, employing or owning capital or property, or maintaining an office, in this State. *And such franchise tax shall be in lieu of all other State, county or local taxation upon or measured by intangible personal property used in business by corporations liable to taxation under this act.*" (italics ours)

Section 5 imposes graduated percentage taxes upon net worth, allocated to New Jersey, with a minimum of $50. for foreign corporations.

For nearly a century Erie Railroad Company, (which in fact and law, conducts the business at Coalberg) and its predecessors under a succession of corporate names (New York, Lake Erie & Western Railroad Company, New York

& Erie Railroad Company, Erie Railway Company and Erie Railroad Company), and New York, Susquehanna & Western Railroad Company, and its predecessors, have operated their respective railroads as common carriers engaged in interstate commerce in and through New Jersey under legislative franchies and authority (N. J. P. L. 1853, p. 480; P. L. 1856. p. 42; P. L. 1857, p. 60; P. L. 1860. p. 604; P. L. 1862, p. 206; P. L. 1870. pp. 1166, 1168; P. L. 1871, p. 1250; P. L. 1898, pp. 23, 236; P. L. 1899, p. 82; *Ross* v. *Adams*, 28 N. J. L. 160, 162, same case on appeal, 30 N. J. L. 505, 508; *Black* v. *Delaware & R. C. Co.*, 22 N. J. E. 130, 418; *Erie R. R. Co.* v. *State*, 31 N. J. L. 531; *Jersey City* v. *Erie R. R. Co.*, 84 N. J. L. 761; *Erie R. Co.* v. *Pub. Utilities Comrs.*, 89 N. J. L. 57, 63, 71, *aff.* 254 U. S. 394, 408, and their railroad properties and franchises have been assessed and taxed by the state taxing authorities under the general railroad tax acts since the first one was enacted in 1884 (N. J. P. L. 1903, p. 222; *Rept. on Valuation of Railroads & Canals*, (1911), by Charles Hansel, pp. 29, 227-230; *Central R. Co.* v. *Martin*, 114 N. J. L. 69, 70; *Central R. Co.* v. *Martin* 30 Fed Supp. 41, 42; *Central R. Co.* v. *Martin*, 115 Fed. (2d) 968, 969, cert. denied 313 U. S. 569).

A description of the properties owned or operated by Erie, including those in New Jersey, and Erie's relation thereto, or control therof, appears in *Erie Railroad Reorganization*, 239 I. C. C. 653, 655-660. Since 1884 all railroad property in New Jersey, including the franchises, has been valued and taxed by the state under a separate railroad tax act and, up to 1941, all of the taxes on the franchises belonged to the state, (Chap. 101, N. J. P. L. 1884, pp. 142, 147, Revised, Ch. 208, N. J. P. L. 1888, pp. 269, 274, Ch. 259, N. J. P. L. 1888, p. 376.

When the ordinance in question was adopted (January 25, 1943), and ever since, the railroad tax act (N. J. P. L. 1941, ch. 291, p. 776) (as amended P. L. 1942, c. 337) provided as follows:

R. S. 54:29A-7:

"There is hereby levied an annual property tax upon all property used for railroad purposes at the rate of three percentum (3%) upon true value thereof. The tax hereby imposed shall be assessed by the State Tax Commissioner, in the manner hereinafter provided, for the year one thousand nine hundred and forty-one and for each year thereafter."

R. S. 54:29A-11:

"*Taxes assessed pursuant to this act shall be in lieu of all other State or local taxation of or measured by property taxable hereunder*, other than assessments for benefits." (italics ours)

R. S. 54:29A-13: Franchise Tax:

"An annual excise tax is hereby levied upon all railroads operating within this State for the privilege of exercising their respective franchises, to be computed in the manner hereinafter provided. *This tax shall be in lieu of any other tax or taxes of or upon such franchises*". (italics ours)

R. S. 54:29A-20: Assessment; Franchise Tax.

"On or before July twenty-second in each year, the commissioner shall compute the franchise tax payable under this act and assess the amount thereof to each taxpayer".

R. S. 54:29A-23: "Tax for State use.

All receipts from taxation of property used for railroad purposes other than from assessments of Class II property, as described in section seventeen of this act, together with one-half the receipts from the franchise tax imposed hereunder shall be applied to the uses of the State according to law".

Class II property is defined in the act as follows (R. S. 29A-17):

"The value of the other real estate (other than main stem defined as Class I property) used for railroad purposes in each taxing district in this State, including the roadbed (other than main stem), tracks, buildings, water tanks, riparian rights, docks, wharves and piers, and all other real estate, except lands not used for railroad purposes".

R. S. 54:29A-24: Tax for local use.

"a. The entire amount of tax receipts derived from the assessment of Class II property, as described in section seventeen of this act, and one-half the receipts from the franchise tax imposed hereunder shall be, by the State Comptroller, allotted to and paid over to the local taxing districts in which such property is situated".

For the year 1943 (the year in which this ordinance was adopted), the State Tax Commissioner levied upon the railroads in New Jersey, including Erie, under the above quoted provisions of the railroad tax act, franchise taxes (payable in 1944) in the aggregate sum $9,309,225.23, half of which was allocated to the municipalities, including the Township of Saddle River, on the proportionate formula

prescribed by the statute. (*Thirteenth Annual Report of the State Tax Department* to the Governor and Legislature of New Jersey, 1944 (pp. 3, 11, 19), officially published pursuant to law (*R. S. 54:1-13*). The report for 1944 taxes, payable in 1945 has not yet been published.

From the foregoing statutes of New Jersey it conclusively appears that:

(a) The Township of Saddle River has no power to impose a local excise or franchise tax upon any of these corporate appellants for the privilege of exercising their respective franchises, or doing business, within that municipality, since that power has been preempted by, and reserved to, the State.

(b) As respects all of the corporate appellants, the ordinance in question, as construed by the Court below, attempts to impose, without legislative authority, a duplicate (second) franchise tax, in addition to that already imposed and collected by the State.

(c) As respects Erie, under that ordinance as construed by the Court below, the Township of Saddle River attempts to collect a duplicate tax upon the same franchise and privilege in addition to that which has already been assessed and collected by the State and of which the Township of Saddle River has since 1941, already been paid its statutory proportion.

(d) The conclusions of the Court below that the tax imposed by the ordinance was a valid "license or privilege tax or excise levied for both revenue and regulation under the police power" (R. 266) totally disregards, and is

contrary to, the express, plain and unambiguous provisions of the statutes above quoted, and contrary to the historical theory, and practice, of corporate franchise tax legislation in New Jersey applicable to foreign corporations, authorized to do business in New Jersey, like Independent and the Coal Company, since 1904 (Ch. 221, P. L. 1904, p. 384), and, as applicable to Erie, since 1884 (ch. 101, P. L. 1884, pp. 142, 146).

The taxable status of the coal has nothing to do with this case. Under the laws of New Jersey, none of it was taxable against any of these appellants because they were not the owners of any of it. As against the owners of the coal in storage, it was exempt from taxation under the state statute. *Pattison & Bowns* v. *Township of Saddle River,* 129 N. J. L. 135, affirmed (by the Court below), 130 N. J. L. 177. This ordinance was adopted solely for the avowed purpose of imposing *upon appellants* a tax in substitution for the taxes which the Township tried unsuccessfully to levy against the *owners* of the coal. *Independent Warehouses, Inc.* v. *Saddle River,* 52 Fed. Supp. 96, 96-97; *Independent Warehouses, Inc.* v. *Saddle River,* 132 N. J. L. 390, 392. Hence, the corporate appellants are already regularly taxed for all forms of property, including franchises, which are taxable under the laws of New Jersey.

In *Adams Express Co.* v. *Kentucky,* 166 U. S. 171, at page 181, this court expressed its concurrence in a decision of the Kentucky Court of Appeals (in *Levi* v. *Louisville,* 97 Ky. 394; 28 L. R. A. 480), which held:

> "* * * that a license tax which is not a property tax cannot be substituted for an *ad valorem* tax upon personal property engaged in commercial pursuits * * *."

A license fee imposed, by, or under, state law, as a condition precedent to the right or privilege of conducting an interstate business, or facility, whether under the power to tax for revenue, or under the police power if it exceeds the cost of inspection or supervision, imposes a regulation of, and burden upon, interstate commerce, in violation of the Commerce clause and the Interstate Commerce Act.

In *Simpson-Crawford Co.* v. *Atlantic Highlands*, 158 Fed. 372, 374, the municipal ordinance licensed vehicles for purposes of revenue. The court said: "There is nothing in the ordinance indicating, on the part of the * * * borough * * * a purpose to exercise a mere police power for the protection of the inhabitants of the borough. The fee imposed is an *arbitrary sum*, and its payment is exacted as a condition precedent to the right to transact business in the borough. It is evidently a revenue ordinance." As to the company "it is a tax on interstate commerce." While it is true that the fee is imposed on all vehicles, as was said in *Robbins* v. *Shelby Taxing Dist.*, 120 U. S. 489; "Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state" (p. 497).

See also, *Furst* v. *Brewster*, 282 U. S. 492, 497-8; *Ingels* v. *Morf*, 300 U. S. 290, 294, 295, 296, 297; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 645, 648; *Crutcher* v. *Kentucky*, 141 U. S. 47, 58; *Sault St. Marie* v. *International Transit Co.*, 234 U. S. 333, 340-1.

Postal Telgr. Cable Co. v. *Adams*, 155 U. S. 688, involved the question of an alleged undue regulation of, and burden upon, interstate commerce, in the form of taxes

imposed by the State of Mississippi for the privilege of conducting business within that state.

The state statute provided, and the state court held, that such taxes were in lieu of all other state, county and municipal taxes (p. 697). The commuted license tax amounted to $391.28 per year, in lieu of *ad valorem* taxes that would have amounted to $1,188.56 per year for state and county purposes, alone, and a larger amount if municipal taxes were added (p. 689).

The following are pertinent extracts from the opinion:

(p. 696)

> "It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax imposed on the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its franchises within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes."

* * * * * *

(pp. 696-7)

"Doubtless, no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce, but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."

The state tax was sustained because the Court found that it was—

(p. 698)

• • • "a reasonable commutation of the amount which the company would be compelled to pay if the taxation were *ad valorem*.' The taxation was neither arbitrary nor discriminating, nor, so far as we are advised, was payment made a condition precedent to doing business, but collection was enforceable by suit and the remedies pertaining thereto, and not otherwise."

• • • • • • • • •

(p. 700)

"In the case before us, the tax was graduated according to the amount and value of the property measured by miles, and was in lieu of taxes levied directly on the property. In marking the distinction between the power over commerce and municipal power, literal adherence to particular nomenclature

should not be allowed to control construction in arriving at the true intention and effect of state legislation. We are of opinion that it was within the power of the state to levy a charge upon this company in the form of a franchise tax but arrived at with reference to the value of its property within the state and in lieu of all other taxes, and that the exercise of that power by this statute, as expounded by the highest judicial tribunal of the state in the language we have quoted, did not amount to a regulation of interstate commerce or put an unconstitutional restraint thereon."

Five cases are cited (pp. 698-699) in support of the above quoted principles. Subsequent decisions to the same effect are *United States Express Co.* v. *Minnesota*, 223 U. S. 335, 342; *St. Louis S. W. R. Co.* v. *Arkansas*, 235 U. S. 350, 364-5; and *Northwestern Mut. L. Ins. Co.* v. *Wisconsin*, 247 U. S. 132, 134, 138, which is one of the cases cited by the Court below in support of its conclusion.

Another pronouncement against the validity of an ordinance of this sort appears in *Murdock* v. *Pennsylvania*, 319 U. S. 105, 113, which involved a municipal ordinance for revenue.

In *New Jersey Bell Tel. Co.* v. *State Board*, 280 U. S. 338, the case involved a New Jersey franchise tax on the privilege of using the public streets for interstate and intrastate telephone business. The court said (p. 346):

"It is elementary that a state may tax property used to carry on interstate commerce. But, as the Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a state may not tax, burden or interfere with such com-

merce or * * * *impose a license fee* or other burden *upon the occupation or the privilege of carrying on* such commerce, *whatever may be the instrumentalities* or means employed to that end (citing cases). This tax cannot be sustained if it is not upon the property, but is in fact a tax upon appellant's gross receipts * * * or a license fee to be computed thereon." (Italics ours.)

(p. 347)

"* * * the law cannot be sustained if it operates to burden or regulate interstate business." (Citing cases.)

(p. 349)

"We think it very plain that the exaction is not a tax on property nor in substitution for or in lieu of a property tax. Within the rule heretofore applied in this court the exaction is a direct tax on gross receipts derived from appellant's interstate commerce and, as to that part at least, is void." (Citing numerous cases.)

The above cases hold that excise taxes, or license fees, imposed upon the privilege of doing interstate business have been sustained *only* (a) if such taxes, or fees, are imposed in lieu of all taxes upon the property; (b) if they do not exceed a sum which might be leviable as taxes upon the property itself; (c) if payment is not made a condition precedent to the right to carry on the business; *and* (d) if the enforcement of payment is left to the ordinary means devised for the collection of taxes.

The ordinance, and license tax, here involved violates all four of those conjunctive conditions.

Cases Cited by Court Below.

The cases cited by the Court below in support of its conclusion that the coal had lost its interstate status when it was unloaded for storage at Coalberg are all tax cases. Not one of them involved a *storage-in-transit, or any other transit privilege, or transportation facility or service, under section 1(3) (a) of, or tariffs duly filed in accordance with, the Interstate Commerce Act.* They all involved commodities in the private possession of the owners thereof, that had completed, or not yet begun, any interstate transportation under tariff rates or regulations. The purposes for which the commodities were at rest in those cases had nothing to do with their transportation in interstate commerce.

None of the numerous cases specifically dealing with the interstate aspects of storage-in-transit, and none of the pertinent provisions of the Interstate Commerce Act, cited in the briefs or arguments of Appellants in the Court below, was mentioned, or referred to, in its opinion.

An examination of the cases cited by the Court below, on this point show that they are all inapposite except in the respects hereinafter noted, or are distinguishable in one or more respects, except *State etc.* v. *Engle*, 34 N. J. L. 425 and *Lehigh & W. Coal Co.* v. *Carrigan*, 39 N. J. L. 35 which hold opposite to the conclusion of the Court below, on the very point for which they were cited in its opinion. In fact, the *Carrigan* case was cited for the opposite conclusion in *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95, 102.

For these reasons, space will not be taken to discuss those cases, except for the following pertinent observations

respecting some of them which support Appellants' contentions in this case.

In *Kelley* v. *Rhoads*, 188 U. S. 1, this Court said:

(p. 7)

"The question turns upon the purpose for which the sheep were driven into the state. * * * But if for the purpose of being driven through the state to a market, they would be exempt as a subject of interstate commerce * * *."

(p. 8)

"Bearing in mind that the weight of all of the previous cases in this court has been laid upon the fact of an indefinite delay, awaiting transportation at the commencement of the journey, or awaiting sale or delivery at its termination the facts of this case fail completely to bring it within those authorities."

The undisputed evidence in the present case, as found by the State Supreme Court (R. 254-256) and as recited by the Court below (R. 268-271), shows that the purpose for which the coal was brought to Coalberg was solely for storage-in-transit and later continuance under the initial shipping contract, to its ultimate market at some other destination. The limitation of delay in storage is not "indefinite", but is expressly prescribed by the controlling tariff and shipping contract. Its interstate journey had already commenced. It was not held for sale or delivery at Coalberg, since that is not an intended, or even possible, market for the coal.

The case of *Kelley* v. *Rhoads* was decided in 1903, three years before the Hepburn Act (1906) constituted storage

and kindred services a part of interstate transportation and placed them within the exclusive jurisdiction of the I. C. C.

In *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, the Court sustained a state tax upon the state-earned proportion of the entire net income. The important distinction between that case and the present is shown by the following statement in the opinion (p. 119):

> "Payment of the tax is not made a condition precedent to the right of the corporation to carry on business. * * * Its enforcement is left to the ordinary means of collecting taxes * * * (citing cases). The statute is, therefore, not open to the objection that it compels the company to pay for the privileges of engaging in interstate commerce."

In the present case the license and the prepayment of the tax are conditions precedent to the right to conduct, or be employed in, the business and the only enforcement is by fine or imprisonment, or both, with cumulative daily penalties.

In *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, the court cited, and quoted, (pp. 326-327) from *Postal T. C. Co.* v. *Adams*, 155 U. S. 688, 695, 696 later cited herein, and (pp. 327-328) from *Philadelphia S. & M. Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 345. The quotations from both cases support Appellants' present contentions as to the invalidity of the license tax involved in this case.

In *Northwestern Mut. L. Ins. Co.* v. *Wisconsin*, 247 U. S. 132, the court sustained state "taxes or license fees" levied upon a domestic corporation for the privilege of doing business. The tax involved was a commutation tax

"in lieu of all taxes for any purpose authorized by the laws of this state", except upon real estate. The grounds of this court's decision are stated at pages 137 and 138 of the opinion. Its conclusion (p. 138) was that the tax was valid because:

> "* * * its amount not being in excess of what would be legitimate as an ordinary tax on the property taken at its value."

It held (p. 138) that the tax was not a burden on interstate commerce

> "* * * since the gross receipts coming from that character of business are used only as a measure of the value of the property and franchise lawfully taxable in the state."

In *McGoldrick* v. *Berwind-White Coal M. Co.*, 309 U. S. 33, the court sustained a local sales tax on coal sold after the interstate transportation had ended and delivery had been made by the carrier to the consignee. The Court said (p. 58):

> "Here the tax is conditioned upon a local activity delivery of goods within the state upon their purchase for consumption."

The opinion reviews the cases on both sides of the question but does not overrule any of the cases cited in this brief. That decision was distinguished, on the merits of the present case, in *Nippert* v. *Richmond*, 90 L. ed. Adv. Rep. 496, U. S.

In *McCall* v. *California*, 136 U. S. 104, cited by the Court below (R. 267), the Court considered the conviction of, and

a fine of $20.00 imposed upon, a railroad agent of an off-line agency in San Francisco of New York, Lake Erie & Western Railroad Company, predecessor of Erie Railroad Company.

The Court, in reversing the conviction, held (p. 109) that the solicitation of passenger traffic by that agency was interstate commerce "as much so as is the carrying of freight," and that:

> "The object and effect of his soliciting agency were to swell the volume of the business of the road. It was one of the '*means*' by which the company sought to increase and doubtless did increase its interstate passenger traffic * * *. The tax upon it therefore was, according to the principles established by the decisions of this court, a tax upon a means or an occupation of carrying on interstate commerce, pure and simple."

The Court overruled the contentions (a) that the business of the soliciting office was only remotely connected with the business of the railroad company because the railroad ran only between Chicago and New York, (b) that the license tax involved could not directly affect the commerce of the road, and (c) that the business of the San Francisco agency was not essential to such commerce. On these contentions, the Court held "that the essentiality of the business of the plaintiff-in-error to the commerce of the road he represented is not the test as to whether that business was a part of interstate commerce," and that, if the business of the San Francisco agency was a part of the commerce of the road, or if it assisted, or was carried on with the purpose to assist, in increasing the amount of

traffic on the road, "the power to tax it involves the lessening of the commerce of the road to an extent commensurate with the amount of business done by the agent" (p. 111). In that case the Court quoted, with approval, from *Sherlock* v. *Alling*, 93 U. S. 99, 102, 103, the following (p. 114):

> "'* * * it will be found that the legislation adjudged invalid imposed a tax upon some *instrument* of subject of commerce, or *exacted a license fee from parties engaged in commercial pursuits*, * * *. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels or conditions for carrying it on' ". (italics in original.)

The *McCall* case is particularly pertinent to the case at bar because (a) the in-transit storage facilities at Coalberg were maintained by Erie as a "means" of increasing the volume and revenues of its interstate commerce; and (b), in the present case the Court below sustained the conviction of an employee because his employer failed to obtain a license. His functions as manager of the warehousing service was similar to that of McCall as agent of the carrier in San Francisco.

On the same day the opinion in *McCall* v. *California* was read, the court also decided the case of *Norfolk & Western R. R. Co.* v. *Pennsylvania*, 136 U. S. 114, involving a state licensing statute. The Court incorporated the *McCall* decision by reference (p. 118) as authority for the declaration——

> "• • • that a State cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits."

Emphasis was again placed upon attempts to license "an instrument" of interstate commerce (p. 119, 120).

In the *Norfolk & Western* case the license tax was imposed for the privilege, and as a condition precedent to the right, of maintaining an office in Pennsylvania. In that case, as in the present case, the parties had complied with another statute requiring a certificate from the Secretary of the Commonwealth entitling it to maintain an office (transact business) therein (p. 120).

The Court held (p. 120):

> "*That office was maintained because of the necessities of the interstate business of the Company, and for no other purpose.* A tax upon it was therefore a tax upon one of the means or instrumentalities of the Company's interstate commerce; and as such was in violation of the commercial clause of the Constitution of the United States." (Italics ours.)

The above italicized sentence applies to the Coalberg storage facility.

II.

The license fee prescribed by the ordinance is arbitrary, unreasonable, discriminatory and prohibitory, and deprives appellants, and each of them, of their property without due process of law; denies to them equal protection of laws; and denies to them their privileges and immunities as citizens of the United States, in violation of the fourteenth amendment of the Constitution of the United States.

(Assignment of Errors, pgf. 3 (R. 283-285); Statement of Points, pgf. III, (R. 288).)

In this case in the United States District Court, for the District of New Jersey (*Independent Warehouses, Inc. v. Township of Saddle River,* 52 Fed. Supp. 96) the District Judge found:

(pp. 96-97)

"Originally the Township of Saddle River, within the confines of which the storage site was situated, had taxed the coal stored there as personal property under the tax laws of New Jersey. In 1925 by virtue of an act of the Legislature of New Jersey, Chapter 221, Laws of 1925, R. S. 54:4-3.20, N. J. S. A., personal property stored in a warehouse of one engaged in the business of storage for hire was made exempt from such tax. This Act was held constitutional by the New Jersey Court of Errors and Appeals, 130 N. J. L. 177, 32 A. 2d 363, in a per curiam opinion affirming the opinion of Justice Colie in the New Jersey Supreme Court in the case of Pattison & Bowns, Inc. *v.* Township of Saddle River et al., 129

N. J. L. 135, 28 A. 2d 485. Thereafter, in an attempt to secure revenue lost by virtue of its inability to impose such a personal tax, the Township by ordinance imposed an annual license fee on all persons conducting the business of storage for hire in a warehouse, such fee to be computed on the basis of a certain rate per square foot, a device which would return to the Township in the particular situation under consideration an amount approximately equal to the personal tax assessed before the test of the above mentioned act of the Legislature.".

The New Jersey Supreme Court found (R. 255):

"The controversy between these parties is over the right of the municipality to levy taxes on this coal. This yard is operated as a warehouse, and the taxation of the coal was set aside by this court and our opinion was affirmed by the Court of Errors and Appeals in *Pattison & Bowns, Inc.*, v. *Saddle River Township*, in 129 N. J. L. 135, aff'd. 130 Id. 177. It was there held that coal stored in fenced in piles on an otherwise open tract of land equipped with machinery to handle the same is within the purview of R. S. 54:4-3.20 (exempting from taxation goods stored in warehouse).

The attempt was then made to accomplish the same result by the adoption of the ordinance under which the prosecutors were convicted." • • •

"The prosecutors raise many questions in their attack on the legality of this ordinance, the principal ones being that the coal in reality is being taxed by the license fees, whereas it is exempt from taxation, because it is in warehouse as held by the *Pattison & Bowns case, supra;* also it is exempt from taxation because of its character as interstate commerce, also because of an unreasonable, arbitrary,

capricious and discriminatory exercise of the licensing power.

"We think these arguments are well made and that the ordinance is invalid." (R. 256).

Those two courts have agreed that the proposed license fee is, in effect, a tax imposed by the Township of Saddle River in an intentional "attempt to secure revenue lost by virtue of its inability to impose such a personal tax on the coal".

The *Pattison & Bowns* case involved a Township assessment upon the coal in storage at Coalberg, and taxes levied thereon of $11,325.60 for 1940 and $11,151.36 for 1941.

Because this ordinance imposes a revenue tax measured by land area of the "place or premises" in or at which the business is conducted, it, in effect is a tax upon that land. *Thompson* v. *Kreutzer*, 112 Miss. 165, 72 So. 891.

The "place or premises" involved is owned by, and assessed against, the Pennsylvania Coal Company, and the taxes levied thereon, together with all improvements, have been regularly paid by it (Ex. P-2, R. 18, 76). Independent owns no taxable property in the Township.

The Court below attempted to justify the amount of this annual license fee by the observation (R. 273):

> "From 1903 to 1940, when tax exemption was claimed * * * the plant was successfully managed notwithstanding that property taxes were paid on the stored coal in an amount not less than the current license tax."

That observation involves the following errors;

(a) The tax on the coal was levied against, and paid by, the *owners* thereof in private storage. It was not levied against, or paid by, any of the Appellants, and it imposed no financial burden upon the "plant" or its management, which was then in private operation (R. 85).

(b) The tax revenue formerly derived from assessments on the coal is, by this ordinance, sought to be shifted to Independent and therefore to Erie which, since February 25, 1939, has in effect, operated the plant and been obligated to pay all lawful taxes on the plant, its operation, and the business conducted there.

(d) The amount of the annual license tax, as the ordinance has been construed, and administered in the complaint against, and the conviction of, Independent and James Thompson, would amount to $20,475; or nearly twice the amount of the former annual taxes on the coal. That license fee represents the equivalent of $1.50 per ton on all coal put in storage in 1943 (R. 87).

The amount of the annual license fee being *fixed*, according to the ground area of the plant, the rate per ton of coal stored would increase in the inverse ratio of the quantity of coal in storage, which has been decimated since 1941 (Ex. P-10, R. 49, 87; Ex. P-17, R. 60, 90). The gross revenue derived from the storage facilities and services is 28 cents per ton.

It is a self-evident proposition that, if this license fee must be paid, it must be borne by Erie out of revenues derived from the transportation of the coal in interstate commerce, or imposed on shippers as an additional cost of

their interstate commerce. In either event it becomes a direct burden upon such interstate commerce.

Neither recourse is feasible because the tariff rates on the transportation of the coal were fixed by I. C. C. (R. 114), *Alden Coal Co.* v. *Central R. Co. of N. J.*, 263 I. C. C. 639, (affirmed by a 3-Judge U. S. District Court, Dist. of N. J. July 12, 1946 in *Gardner, Trustee,* v. *United States,* not yet reported). Those rates, and the rates for the storage services, are uniform on all competing carriers, (R. 109-111, 112-114). The result would be either a diversion of the traffic to competing carriers who provide such facilities (R. 113) and a resulting diminution of Erie revenues, or the creation of a discrimination against shippers of coal over Erie and connecting carriers.

In *Philadelphia & R. Co.* v. *Pennsylvania*, 82 U. S. 232, a tax on the privilege of conducting business was measured by the rate per ton upon all commodities carried by railroad.

The question was whether the tax imposed a burden upon interstate commerce.

The court concluded that it was impossible to escape the conviction that the burden of the tax rested on the freight transported, or upon the consignor or consignee thereof (p. 274). The Court said:

> "Beyond all question, the transportation of freight or of the subjects of commerce for the purpose of exchange or sale is a constituent of commerce itself" (p. 275).

* * * * * *

"The payment of that tax is a condition, upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other states would be rendered impossible" (p. 276).

"* * * the tax is not proportioned to services rendered, or to the use made of canals or railways. It is the same, whether the transportation be long or short. It must, therefore, be considered an exaction, in right of alleged sovereignty, from freight transported, or the right of transportation out of, or into, or through the state—a burden upon interstate intercourse" (pp. 278-9).

* * * * * *

"Merchandise is the subject of commerce. Transportation is essential to commerce; and every burden laid upon it is *pro tanto* a restriction. Whatever, therefore, may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the states, we regard it as established that no state can impose a tax upon freight transported from state to state, or upon the transporter, because of such transportation" (pp. 281-2).

That decision is cited, and the substance of the above quotations therefrom, is repeated in *Helson* v. *Kentucky*, 279 U. S. 245, 248-249, 250. See also *Adams Expr. Co.* v. *Ohio State Auditor*, 166 U. S. 186, 218; *Galveston H. & S. A. Ry. Co.* v. *Texas*, 210 U. S. 217, 227; *Meyer* v. *Wells, F. & Co.*, 223 U. S. 298; *Kansas City, F. S. & M. R. Co.* v. *Botkin*, 240 U. S. 227, 231.

The above quoted findings, in the present case, of the District Court and the New Jersey Supreme Court, and other matters above set forth, show that this ordinance was not a *bona fide* revenue measure, but was an arbitrary, and discriminatory device to circumvent a statutory tax exemption on the coal, and to exact from Appellants or some of them, a tax in substitution therefor, and in addition to all other lawful taxes.

While this ordinance purports to be general in its application, it was enacted for sole application to the Coalberg business for the sole purpose above found by the District Court and the New Jersey Supreme Court. There was no other business of storing goods for hire in the Township (R. 125).

Ordinances adopted with a similar motive are reviewed *In re Wo Lee*, 26 Fed. 471, and *Yick Wo* v. *Hopkins*, 118 U. S. 356. At page 371 of the *Hopkins* case there is a discussion of the case of *Ohio* v. *Cincinnati G. L. & C. Co.*, 18 Ohio 262, 300, where an ordinance purporting to fix the price of gas, under authority of law giving power to do so, was held bad, as passed in bad faith and fixing an unreasonable price for the fraudulent purpose of compelling the gas company to submit to an unfair appraisement of its works.

In *Murdock* v. *Pennsylvania*, 319 U. S. 105, 137, the Court held that an abuse of lawful authority was an unlawful exercise of authority.

The Constitution of the United States provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citi-

zens of the United States; nor shall any State deprive any person of * * * property, without due process of law; * * *." (Amend. XIV)

(a) The ordinance is arbitrary.

The ordinance is arbitrary in that it provides an annual license fee, measured by the anomalous method of ¾ of a cent per square foot of total area of the place and premises in or at which the business is conducted, without relation to volume of business conducted, tons of coal in storage, or gross or net earnings of the operation, but equal, if applied to the place or premises designated in the complaint (R. 5) and conviction (R. 7) to the entire assessed valuation of the land where the inhibited business is alleged to have been conducted (Ex. P-1, R. 18A, 64; P-2, R. 18, 76, 86-87).

Admitting that this was an "interstate business" the Court below held (R. 272-273):

> "And we perceive no force to the contention that the license fee is arbitrary, unreasonable and prohibitory, and repugnant to Federal and State constitutional guaranties, in that (1) the license fee is measured on a square foot basis 'without relation to volume of business conducted, tons of coal in storage, or gross or net earnings of the operations' (2) the fee is fixed 'without relation to the value of the privilege of conducting the business,' and is exorbitant; and (3) the fee is in *quantum* such as will 'prevent the conduct of this interstate business within the municipality'."

Thirty-six other kinds of businesses are licensed under ordinances of the Township (Ex. P-13 R. 50, 133) all of

such businesses are licensed on the basis of flat annual fees ranging from one dollar per unit up to five hundred dollars per unit, without reference to area occupied. The total receipts of the Township for all license fees in 1943 was $4,374 (R. 189, 193-194). Coal yards require no license, yet the Coalberg coal yard is arbitrarily singled out as the only business licensed (R. 194), and, as above shown, that device was used for a special and single purpose of recouping lost taxes unlawfully imposed upon coal stored on this specific property. The resulting license fee may be $20,475 per year according to the construction of the ordinances in the complaints and convictions and depending upon the whim of the Township officers. This discriminatory treatment of the Coalberg plant is purely arbitrary.

Coal is stored in the open and requires large land areas for that purpose, owing to the natural spread of piles. Many other commodities are generally stored in multiple-storied buildings. A ten-story warehouse with the same total floor area, would, under this ordinance, pay an annual fee of ¾ cents per square foot for the ground area of the first floor, only (one-tenth of the license fee for Coalberg), yet such a building might do as much, or more, business. This method of computing the license fee is purely arbitrary.

The Court below cited *Federal Compress & W. Co.* v. *McLean*, 291 U. S. 17, as authority for what it called a "familiar legislative practice" of "A tax on a public warehouse graduated according to storage capacity" (R. 273). In that case the tax had nothing to do with "storage capacity." It was "graduated according to the number of bales of cotton

compressed per annum" (p. 18), which is definitely a basis of volume of business done.

The business of storing goods for hire is not licensed elsewhere in New Jersey under any ordinance or statute, except that the cold storage warehouses for perishable goods are licensed by the State at an annual license fee of $10. for inspection and regulation by the State Health Department (R. S. 24:9-3).

(b) The ordinance is unreasonable.

At the outset, a few comparisons of annual license fees, imposed by New Jersey state laws, and ordinances of Saddle River Township, will illustrate this point:

Liquor Warehouses (R. S. 33:1-14)	$ 100.
Bonded Liquor Warehouses (R. S. 33: 1-10 (5)	500.
Cold Storage Warehouses (R. S. 24:9-3)	10.
Rendering Plants (Ex. P-14, R. 52)	150.
Health License (R. 187)	350.
Live Poultry Dealers (Ex. P-13, R. 51)	25.
Carnivals (Ex. P-13, R. 50)	500.
Motion Picture Houses (Ex. P-13, R. 51)	50.
Junk Yards (Ex. P-13, R. 51)	25.
Retail liquor licenses (R. 186)	250.

All of these items are enterprises involving more or less danger to public health, welfare and morals and which have nuisance aspects requiring special police, fire or health supervision. The Coalberg plant has none of these characteristics, but is in the same class as other unlicensed coal yards (R. 139).

The reasonableness of a license fee is usually measured by the cost of administering the ordinance if it is a police power measure, or by the value of the privilege conferred by licenses for revenue if within the power of the municipality to grant.

This license fee is fixed without relation to the value of the privilege of conducting the business, the volume of business done, the tonnage stored, or the gross or net revenue thereof. The ordinance interdicts the conduct of this business without the prepayment of an unreasonable, and exorbitant, annual license fee.

The annual gross receipts of Independent Warehouse, Inc., from its business at the coal storage plant were as follows: for fiscal years from June to May as the warehouse company's accounts are kept (R. 137):

1939-40	$937.27
1940-41	500.00
1941-42	500.00
1942-43	500.00
1943-44	500.00

The excess over $600. for 1939 (R. 242), represents fees for warehouse receipts collected by Independent from owners of stored coal in excess of prescribed minimum of guaranteed compensation under the above mentioned agreements.

The total over-all gross collections, the operating expenses, and the net financial result, of the plant operation are shown in the record as follows (Ex. P-10, R. 49, 87).

	1941	1942	1943
Receipts	$26,035.02	$18,342.82	$14,422.66
Expenses	33,674.04	36,720.20	45,158.25
Net *deficit*	$ 7,639.92	$18,377.32	$30,735.59

These deficits are met out of the line-haul revenue from the shipments.

The uncontradicted evidence shows that the license fee is prohibitive (R. 138-140) as to the business done by the Warehouse Company and also as to the use of the storage plant for the in-transit storage of coal under the railroad tariffs. The warehouse company could not increase its charge for public warehouse services because of the competitive character of its business (R. 136), or without permission of the Federal Office of Price Administration (R. 139), and any increase in the tariff charges under which the coal is stored at the plant is subject to approval of the Interstate Commerce Commission, and the loss of competitive status of Erie and participating carriers with relation to other coal carrying railroads (R. 112, 114, 124).

Although the license fee is "expressly declared to be imposed for revenue", it is not in lieu of any lawful property tax because, under the laws of New Jersey, the coal in storage is personal property exempt from taxation and all other taxable property at said plant is already assessed and taxed in the full measure of the requirements of all state laws (Ex. P-2, R. 18, 76).

The license fee is, in fact, an excise tax levied upon the privilege of conducting a business, which in this case is an exclusively interstate business. It is not an exaction to

defray the expenses of regulation or inspection of a business affecting the public health, welfare or safety of the community.

There are two separate and distinct classes of ordinances licensing businesses; those adopted in the exercise of the police power, and those adopted for revenue.

In so far as the federal constitution is concerned, it makes no difference whether the license ordinance is for regulation under the police power, or for revenue. *Murdock* v. *Pennsylvania*, 319 U. S. 105, 139.

On this aspect of the Ordinance, the New Jersey Supreme Court held:

> "The prosecutors were engaged in a legitimate business, and it seems to us that the enactment of this ordinance was not a reasonable exercise of the police power for the promotion of public health, safety or general welfare but was an arbitrary attempt to raise revenue by discriminating against the business of prosecutors in the guise of license fees, and to thus secure from it a sum equivalent to taxes which would accrue, were the property not exempt." (R. 256).

The Court below stated that the ordinance was "admittedly a revenue measure" (R. 265). It also stated that it involved "a license or privilege tax or excise levied for both revenue and regulation" (R. 266). In that respect the Court referred to certain parts of the ordinance:

Section 4 (R. 10) provides:

> "If perishable goods are stored at said licensed premises, said place or premises and the manner and conduct of said business shall in all respects

comply with any and all health regulations required by any Federal, State or Municipal health authority."

This section is meaningless:

(a) There are no storage places for perishable goods in the Township.

(b) No perishable goods have ever been stored at Coalberg, and it has no facilities for that purpose.

(c) The ordinance is impotent to secure the enforcement of Federal or State health regulations, since applicable Federal and State laws contain their own means of enforcement.

(d) The municipality has no authority to regulate the storage of perishable goods because the State Department of Health has exclusive jurisdiction, under the State laws, to license and regulate every storage warehouse where perishable food is stored within the state *(Chapter 9, Title 24, N. J. Revised Statutes)*.

Section 5 (R. 10) required compliance with all Township police and fire regulations (which, of course, apply to all property or business generally), and this ordinance neither specifies nor prescribes any such regulations. Section 6 (R. 10) provides for police, fire and health inspection, and police reports on the storage of inflammable or combustible matter. This, again, is a provision already contained in general municipal regulations.

The ordinance states that the license fee thereby imposed "is hereby expressly declared to be imposed for revenue" (Sec. 3, R. 10). The Court below stated that the ordi-

nance "levies, admittedly as a revenue measure, an 'annual fee' ", and that the ordinance was enacted in purported exercise of the power conferred by *R. S. 40:52-1(g)* and *40:52-2*" (R. 265, 266). Those two sections, relating exclusively to licensing ordinances, provide:

> *R. S. 40:52-1:* "The governing body may make, amend, repeal and enforce ordinances to license and regulate:
>
> * * * * * * *
>
> g. Lumber and coal yards, * * *, and all other kinds of business conducted in the municipality * * *, and the places and premises in or at which the business is conducted and carried on; * * *"
>
> *R. S. 40:52-2:* "The governing body may fix the fees for all such licenses, which may be imposed for revenue, and may prohibit all unlicensed persons and places and vehicles, businesses and occupations from acting, being used, conducted or carried on; impose penalties for violation of ordinances providing for licenses, and revoke any license for sufficient cause after notice and hearing".

Notwithstanding the above "expressly declared" purpose of the ordinance to impose a license fee only "for revenue" (Sec. 3, R. 10), and the affirmance of the Court below that the challenged ordinance "levies, admittedly as a revenue measure, an 'annual fee' ", the Court below held that the sections above quoted "involves a license or privilege tax or excise levied for both revenue and regulation under the police power" (R. 266). The last quoted statement is the only reference in the opinion to the "police power".

Respecting similar attempts to sustain state or municipal interference with, or regulations of, interstate commerce by an injection of "police power", this Court has repeatedly said:

> "The decisions also show that a state cannot avoid the operation of this rule (the exclusive control of Congress) by simply invoking the convenient apologetics of the police power."

Kansas City S. R. Co. v. *Kaw Valley Drainage Dist.*, 233 U. S. 75, 79; *Southern Pac. Co.* v. *Arizona*, 325 U. S. 761, 779-780; *Morgan* v. *Virginia*, 90 L. ed. Adv. op. 982, 986; U. S.

In the last mentioned case (L. ed. Adv. Op. p. 984; the Court held:

> "* * * if the statute unlawfully burdens interstate commerce, the reserved powers of the state will not validate it."

There is no pretense in this case that this ordinance was enacted as an exercise of the police power. It plainly states that the license fee is "hereby expressly declared to be imposed for revenue" (Sec. 3, R. 10) and the record conclusively supports that stated object.

A coal yard, or coal business, is not a nuisance *per se*, subject to police power regulation, *46 C. J.* page 697, S. 128.

Ordinances, enacted in the exercise of the police power, are authorized by section R. S. 40:48-2, which is an entirely separate and distinct chapter of the New Jersey laws from the statute authorizing licenses for revenue. (R. S. 40:52-1).

Ordinances under the police power are authorized, as the municipality "may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this sub-title, or by any law."

Under New Jersey law a licensing ordinance enacted as an exercise of the police power cannot be used for raising revenue and the fee is limited to the necessary or probable expense of issuing the license, and of inspecting and regulating the business the license covers. *Morgan* v. *Orange*, 50 N. J. L. 389, 391; *North Hudson Co.* v. *Hoboken*, 41 N. J. L. 71, 78-9, 81; *Dunn* v. *Hoboken*, 85 N. J. L. 79, 86; *Muhlenbrinck* v. *Commissioners*, 42 N. J. L. 364, 367-8; *Cape May* v. *Cape May Trans. Co.*, 64 N. J. L. 80, 84-5; *Gaynor* v. *Roll*, 79 N. J. L. 402, 403; *Clark* v. *New Brunswick*, 43 N. J. L. 175, 176-7.

An ordinance exercising the police power must have the object and effect of promoting public health, safety and general welfare, and if, as in this case, the license fee is in excess of that essential to effect the security of the public, it is an unconstitutional taking of private property for public use without compensation. *Passaic* v. *Patterson Bill Posting Co.*, 72 N. J. L. 285 (Ct. E. & A.); *O'Mealia O. A. Co.* v. *Rutherford*, 128 N. J. L. 587 (S. C.).

Cooley, on Constitutional Limitations, (2d ed.), page 201, lays down the basic rule as follows:

"The authority of the corporation will be limited to such a charge for the license as will cover the ne-

> cessary expenses of issuing it, and the additional labor of officers and other expenses thereby imposed. A license is issued under the police power; but the exaction of a license fee with a view to revenue would be an exercise of the power of taxation."

In *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50, a state licensing and regulating act was held invalid as applied to the circumstances of that case. The state's contention that it had the right to enact laws for such licensing and regulation in the exercise of the police power in the interest of the welfare of its people, was overruled as applied to interstate commerce, even though the business regulated was located within the state (p. 59). The Court held (p. 59):

> "Thus, the states cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it."

In *Sprout* v. *South Bend*, 277 U. S. 163, the court criticized the license fee of $50. per year because it was not imposed as an incident, or to defray the expenses, of municipal regulation, and because it was not shown "that the amount collected under the ordinance was no more than was reasonably required for such a purpose." Then the Court said (pp. 169-170):

> "It follows that the exaction of the license fee cannot be sustained as a police measure."
>
> . . . . . .
>
> "It follows that on the record before us the exaction of the license fee cannot be sustained either as an inspection fee or as an excise for the use of the streets of the city."

City of Philadelphia v. *Western Union Tel. Co.*, 40 Fed. 615, 617, involved the validity of a city ordinance licensing the privilege of maintaining telegraph wires within the city. The court held:

> "The plaintiff cannot tax the defendant,—not only because it is not authorized to do so, but because the state is without power to confer such authority. The imposition of a tax would be an interference with interstate commerce and thus be an infraction of the federal constitution. The plaintiff may and is in duty bound, to subject the defendant, and other similar companies to such proper conditions, restrictions, and supervision, respecting lines within its limits, as are necessary to the public safety, and consequently to such charges as will enable it to perform its duty, without loss to itself. If the ordinance does no more than this it is reasonable, and therefore valid; otherwise it is not. Does it do more? The question in view of the evidence, (about which there is no disagreement), is too narrow to admit of discussion. A statement of the facts disposes of it. The experience of several years shows that $3,000 or at the most $3,500 per year is sufficient to cover every expenditure the city is required to make on this account. The ordinance imposes the payment (in round numbers) of $16,000 annually. This is five times the amount required. It seems to follow as a necessary consequence, that the ordinance is unreasonable. It compels a payment annually of about $14,000 in excess of the amount necessary. This is a tax pure and simple. The city cannot collect and lay by a sum to insure itself against imaginary future demands, which may possibly arise."

One of the most complete discussions on the reasonableness of licensing ordinances appears as a decision of the Virginia Supreme Court of Appeals, in *Williams* v. *Richmond,* 177 Va. 477, as reported in 134 A. L. R. 833. The following are extracts from that opinion (A. L. R. paging used);

(p. 839):

> "In 26 R. C. L., Taxation, sec. 17, appears this statement: 'When a legislative body having power to tax a certain subject matter actually imposes such a burdensome tax as effectually to destroy the right to perform the act or to use the property subject to the tax, the validity of the enactment depends upon the nature and character of the right destroyed. If so great an abuse is manifested as to destroy natural and fundamental rights which no free government could consistently violate, it is the duty of the judiciary to hold such an act unconstitutional.'
>
> * * * * * *
>
> (p. 840):
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> "The test, however, as has been pointed out before, is what may be done under the ordinance. It is clear that strict enforcement of sec. 166 would be a death blow to certain modest callings. This we cannot allow. We hold that sec. 166 is inimical to the due process clause of the Fourteenth Amendment of the Federal Constitution and to Article 1, sec. 1, of the State Constitution."

Many decisions of the federal courts discuss, and criticize, license fees that are excessive, as having no relation to the volume of services rendered, the use made of the licensed business or facility, the volume of business, gross

receipts, or revenue, from the enterprises, or to the expense of regulation.

A leading example of such decisions is found in *Western Union Telgr. Co.* v. *Texas*, 105 U. S. 460 465-6, where the court struck down a state license fee of one cent per telegram. After discussing *Phila. & R. R. C.* v. *Pennsylvania*, (State Freight Tax Case) 82 U. S. 232, 273 and six other cases in which an arbitrary license tax measured by a rate per ton of freight or per passenger were set aside, and *Steamship Co.* v. *Tinker*, 94 U. S. 238 (and two other cases) in which a license tax measured by the *measurement* of vessels were set aside for these reasons, the court held void the Texas license fee of one cent per telegram because it was not fixed according to the volume or value of the services rendered or involved, was without regard to the distance sent or the price received for messages, and was in no respect proportionate to the business done (105 U. S. 460, 465-6).

In *Union Tank Line Co.* v. *Wright*, 249 U. S. 275 (1919, McReynolds, *J.*) the court considered a tax levied under state law (Georgia) upon tank cars operated in interstate commerce. While it held that such cars used in the state were taxable as personal property in the state, it condemned the tax levy because the formula used produced results having no necessary relation to the value of the property (p. 283).

In *Ohio River & W. R. Co.* v. *Dittey*, 232 U. S. 578, the case involved the certification and collection of a tax upon the privilege of carrying on business in the state. It was contended that the tax was in excess of the value of the privilege and this point is discussed at pages 587-9.

The court said (p. 588) that the bill of rights imposed implied limitations upon the power of taxation of privileges and franchises and limited such taxation to the reasonable value of the privileges or franchises conferred originally, or to its continued value from year to year.

The court further said (p. 589):

> " 'These limitations prevent confiscation and oppression under the guise of taxation, and the power of such taxation cannot extend beyond what is for the common or public welfare, and the equal protection and benefit of the people; but the ascertaining and fixing of such values rests largely in the general assembly, but finally in the courts.' "

In *Great Northern R. Co.* vs. *Washington*, 300 U. S. 154, the court considered a tax on public utilities measured by a percentage of gross receipts. The act was defined by the Supreme Court of the state as a regulatory and inspection fee which was to be used as a fund solely for administering the state public utility commission law (p. 156).

In the application of the fund the state made no segregation of inspection and regulation but applied the money to a large number of other purposes (p. 159). The court stated the general established principle that in the exercise of the police power, the state may provide for supervision and regulation of public utilities and may exact the reasonable cost of such supervision and regulation from the utilities concerned, but it held (p. 160):

> "If the exaction be so unreasonable and disproportionate to the service as to impugn the good faith of the law it cannot stand either under the commerce clause or the Fourteenth Amendment.
>
> * * * * * *

"If the exaction be clearly excessive it is bad *in toto* and the state cannot collect any part of it." (p. 161).

Within those limits the court decided that no license tax could be exacted. It held that the tax could not exceed the cost of inspection and regulation. It held that the burden of proving that the tax was reasonable in that regard rested on the state or the parties imposing the tax and that that burden had not been sustained (pp. 165-8).

In *Murdock* v. *Pennsylvania*, 319 U. S. 105, 140, the court said:

> "The ultimate question in determining the constitutionality of a tax measure is—has the state given something for which it can ask a return?"

That case, and another, are cited in *Follett* v. *McCormick*, 321 U. S. 573, in which the court said:

(p. 575)

> "In those cases, the tax imposed was also a license tax—'a flat tax imposed on the exercise of a privilege granted by the Bill of Rights' and therefore an unconstitutional exaction. * * * We emphasized that the 'inherent vice and evil' of the flat license tax is that it 'restrains in advance those constitutional liberties' and 'inevitably tends to suppress their exercise' ".

(p. 577)

> "For, to repeat, 'the power to tax the exercise of a privilege is the power to control or suppress its enjoyment' ".

Following is a pertinent observation of the Court in *Philadelphia & R. R. Co.* v. *Pennsylvania,* 82 U. S. 232, 276 (about the third page of the opinion), quoted in *Helson* v. *Kentucky,* 279 U. S. 245, at page 250:

> "And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other states would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the state, may impose one of $5. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one state to another without being obstructed by the intervention of state lines."

Contrary to the principle declared in *Great Northern R. Co.* v. *Washington,* 300 U. S. 154, at page 168, that the state "must assume the burden of showing that the sums exacted from the appellant do not exceed what is reasonably needed for the service rendered. The State failed to carry this burden"; the Court below held (R. 273):

> "There is a presumption that the tax is reasonable in amount; and the burden rests upon the challenger to overthrow that presumption. It has not been sustained here. There is not such disparity between the 'value of the privilege' and the levy as would render the ordinance arbitrary and discriminatory."

The "value of the privilege" was never shown, and the word "disparity" implies two comparates, neither of which are suggested in the opinion or in the record.

The only attempt made by appellees to support their burden of proof of the reasonableness of the license fee consisted of two different computations based on purely hypothetical areas or quantities of coal in storage, namely:

(a) To show that a hypothetical license fee (not stated as to amount) would not exceed, but might be less than, the amount of the tax formerly levied on the coal in storage (R. 188, 206-211, 220-222, 225-226, 229, 246-247). These computations afford no proof of reasonableness, but do serve as admissions of the fact that this license tax was designed solely as substitute revenue for the lost taxes on the coal.

(b) To minimize the amount of the license fee by computations based on hypothetical quantities of coal (R. 206-208, 220-222, 225, 226, 229, 246-247). The figures used were purely supposititious figures given to the witness by appellees' counsel (R. 221-222, 226-227), and the witness said he did not undertake to ascertan, and had no intention of, and was not interested in, ascertaining, the actual amount of coal involved, which he said, made no difference to him (R. 217-218, 220, 223-224, 227-228, 246-247).

These arbitrary calculations are meaningless, and utterly fail to show the reasonableness of the license fee, or of the ordinance as a whole.

(c) The ordinance is prohibitory.

It has already been shown that the only business subject to this ordinance is the storage business at Coalberg, and that it cannot earn enough to pay the license fee and

the plant would have to be closed (Ex. P-10 R. 49, 86-87, 137-138).

The important feature of this situation is, and the uncontradicted evidence establishes, the fact, that this license fee is so large that its necessary effect is to prevent the conduct of this interstate business within the municipality (R. 86, 138-139), and to cause the loss of property (improvements) valued for taxes at $113,400, which are useful for, or adapted to, no other purpose (R. 85). In that aspect of the situation, and in a very real sense, the ordinance amounts to a positive denial of the right to engage in that business and the destruction of the property for its only suitable purpose. A burden so heavy as to produce that result has been visualized and disapproved in *Southern R. Co.* v. *Reid*, 222 U. S. 424, 443, and *Helson* v. *Kentucky*, 279 U. S. 245, 250.

No question of necessary police, fire or health regulations are involved, since this plant conducts a business which is lawful in itself and presents no hazards to public safety, health or welfare. Consequently, the case does not present any of the problems, or fall within any of the classes, of cases which have sustained an exercise of police power to prohibit, or impose penalties or license fees so high as to discourage, the conduct of a business or occupation.

This ordinance prohibits the conduct of this business "unless and until there shall be granted by the Township Committee * * * a license to conduct said business" (R. 9). The ordinance does not require the Township Committee to grant a license, or specify any conditions upon which it

may refuse to grant it. No review of its action is provided in the ordinance if they refuse, or just fail, to do so. In these respects the situation, and possible results, are simillar to those in *Washington, ex rel &c.* v. *Roberge*, 278 U. S. 116, involving a municipal zoning ordinance of Seattle.

The court held:

(p. 121)

> "Legislatures may not, under the guise of police power, impose restrictions, that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities".
>
> * * * * * * *
>
> The right of the trustee to devote its land to any legitimate use is property within the protection of the Constitution. The facts disclosed by the record make it clear that the exclusion of the new home * * *is not indispensable to the general zoning plan. And there is no legislative determination that the proposed building and use would be inconsistent with public health, safety, morals or general welfare."

While that case involved a different kind of municipal ordinance, the above quoted rulings apply equally to the present case, which, likewise, involves inhibitions of the legitimate use of private property. There is no "legislative determination" in the present case that the Coalberg plant or its use "would be inconsistent with public health, safety, morals or general welfare."

The conviction of James Thompson was unlawful.

It is appropriate here to discuss the conviction of the employee, James Thompson, since the authorities and facts cited, apply equally thereto.

R. S. 40:52-1(g) empowers the municipality to license "all other kinds of business conducted in the municipality." Nothing is said about licensing the employees of persons or corporations conducting such businesses.

R. S. 40:52-2 authorizes the governing body to fix fees for licenses and to impose penalties for violation of ordinances for revenue (without specifying amounts).

Neither of these provisions relate to the employees of such businesses.

Section 1 of the ordinance (R. 9) provides that:

> "* * * no person, firm or corporation shall conduct or carry on the business of the storage of personal property in a warehouse engaged in storing goods for hire *or work in*, occupy, or, directly, or indirectly in any manner whatsoever, *utilize* any place or premises in which is conducted or carried on * * * (such business), unless and until there shall be granted by the Township * * * a license to conduct said business * * *"

Section 7 (R. 10) provides penalties for

> "Any *person*, firm or corporation who shall violate any term or provision of this ordinance * * *" (Italics ours.)

Appellant, James Thompson, was convicted and fined $200 and sentenced to jail for 90 days if the fine was not paid, because he "worked in, occupied or utilized" the Coalberg plant (R. 14).

At the time of his conviction he was one of six, formerly ten, (R. 89) employees at the plant. All of them are classed under Federal laws, as railroad employees in a transportation facility engaged in interstate commerce. *Railroad Retirement Board* v. *Duquesne Warehouse Co.*, 326 U. S. 446.

He was convicted and fined for working in the Coalberg plant for which his employer had failed to obtain a license from the Township of Saddle River.

Mr. Thompson did not conduct or carry on the business of storing coal at the storage plant. That was done by his employer. And Mr. Thompson did not use the plant. It was used by the Railroad Company and its agents, the Coal Company and Independent. The licensing power of the township is limited to the licensing of certain businesses in general and does not extend to employees of those engaged in the conduct of such businesses, whose work, except for the necessity of a license to conduct the business of the employers, would not be unlawful. The power to punish for violation of a municipal licensing ordinance of the present character applies only to those directly responsible for the conduct of the business for which a license is required, and not to employees whose only offense is that of the necessity of earning their daily bread in the pursuit of a legitimate occupation.

The object of the statute is to authorize the licensing of businesses, "and the places and premises in or at which

the business is conducted and carried on" (R. S. 40:52-1 (g)). It does not mention, or purport to apply to employees of the business. It was not the purpose of the statute, and it does not authorize municipalities, to require a license of each employee of a business, or to penalize an employee because his employer fails to comply with a licensing ordinance. Such a provision is not within the language, intendment or purpose of the statute. This ordinance amounts to penalizing an employee for the failures of his employer. Thompson is only one of six, formerly ten, employees at the Coalberg plant. Under this ordinance the Township may penalize each of those employees by a fine of $200 or by imprisonment for 90 days, or both, for each and every day from January 25, 1943 to the end of this litigation for *the failure of his employer* to obtain a license.

This feature of the ordinance unconstitutionally deprives Thompson of a legal right, in violation of the principles set forth in the heading of this point.

Thompson's conviction was, therefore, unlawful, and was properly set aside by the New Jersey Supreme Court because, if for no other reason, it was imposed outside the power of the Township of Saddle River.

With respect to the conviction of James Thompson the Court below held (R. 273):

> "And there is no merit in the contention that the municipality does not possess power under the cited enabling act 'to penalize an employee because his employer fails to comply with a licensing ordinance,' and therefore the conviction of the individual respondent, Thompson, cannot be sustained."

After citing the prohibition of the ordinance against any person to "work in, occupy, or, directly, or indirectly in any manner whatsoever, utilize any place or premises" in which the storage business is conducted without the prescribed license, the Court below continues (R. 273-274):

> "This is the offense of which Thompson was convicted. It was within the competency of the local legislative body to render this a punishable offense, essential to the enforcement of the policy of the ordinance; the power is an integral part of the general grant of authority to license and regulate contained in *sec. 40:25-1(g) and 40:52-2, supra.*"

Neither of the two cited sections of the statute confers such a power upon a municipality, and, certainly, no municipality has powers not granted by statute. The last quoted portion of the opinion of the Court below is contrary to every principle of reason, law and justice. If an employee can be lawfully convicted, fined and imprisoned for the default of his employer in matters over which he has no control, no employee can be safe from punishment. It is no answer to say that he, and all of his associates, must leave their legitimate employment and forego their means of livelihood, unless and until his, and their, employer has obtained a license. The doctrine that one person may be fined and imprisoned for the default of another is certainly alien to our system of law and justice.

III.

The ordinance is indefinite, uncertain, arbitrary, unreasonable and unlawful; (a) as to the amount of the license fee; (b) as to the discretionary power it purports to confer upon the members of the municipal governing body, and its officers and agents, and thereby denies to appellants the equal protection of the laws, in violation of the fourteenth amendment of the Constitution of the United States.

(Assignment of Errors, pfg. 3 (R. 283-285); Statement of Points, pgf. V, (R. 288)).

(a) As to the License Fee.

In *M. Kraus & Bros.* v. *United States*, 90 L. ed. Adv. Op. 653, U. S. (decided March 25, 1946) this Court set aside the convictions involved because the regulations promulgated by the OPA Administrator, upon which the convictions were obtained, were ambiguous. There the Court said:

(p. 657)

"In a very literal sense the liberties and fortunes of others may depend upon his definitions and specifications regarding evasion. Hence to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action. In other words, the Administrator's provisions must be explicit and unambiguous in order to sustain a criminal prosecution; they must adequately inform those who are subject to their terms what conduct will be considered evasive so as to

bring the criminal penalties of the Act into operation. See United States *v.* Wiltberger, 5 Wheat. (U. S.) 76, 94-96. The dividing line between unlawful evasion and lawful action cannot be left to conjecture."

* * * * * *

"But patent omissions and uncertainties cannot be disregarded when dealing with a criminal prosecution. A prosecutor in framing an indictment, a court in interpreting the Administrator's regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express words of fair implication. Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act."

In *United States* v. *Merriam*, 263 U. S. 179, the Court construed a tax statute. At page 188, it said:

"If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer."

In *Williams* v. *Richmond*, (134 A. L. R. 833), 177 Va. 477, the court stated that tax laws are to be liberally construed in favor of taxpayer, and that if there be substantial doubt, it must be resolved in his favor. The court said (A. L. R. paging used):

(pp. 836-837)

"One of the prime requisites of any statute is certainty, and this is especially true of a taxing

statute. It is said in 25 R. C. L., Statutes, § 307: It is to be fairly and justly presumed that the legislature, which possesses a power so comparatively unrestrained in its force and searching in its extent as the power of taxation, has so shaped the law as, without ambiguity or doubt, to bring within it everything that it was meant should be embraced. And the rule is expressed thus in 59 C. J., Statutes, § 160: Act imposing tax must, under the rules above stated, be certain, clear, and unambiguous, especially as to the subject of taxation and the amount of the tax.''

(p. 837):

''There is a particularly apposite statement in the early Texas case of Western Union Telegraph Co. *v.* State of Texas, 62 Tex. 630: 'it is of the utmost importance, for the protection of the taxpayer, that tax laws should be certain, both as to the thing taxed and as to the amount of the tax, and the manner for its ascertainment; that the tax-payer may have an opportunity, without the expense of litigation, to pay such taxes as he may owe; and a tax law which does not accomplish this purpose ought to be held invalid, whether this results from an attempted exercise of power not possessed, through which the law becomes uncertain by both proper and improper subjects being combined and selected for taxation, or by the failure of the legislature for any other reason to furnish the rules by which taxes may be levied, assessed and collected.' ''

See also *State* v. *Ashbrook*, 154 Mo. 375; *Commonwealth* v. *Pennsylvania W. & B. P. Co.*, 271 Pa. 456; *Interpretation of Statutes, Endlich*, p. 478.

Section 3 of the ordinance prescribed a license fee of three-quarters of a cent "for each square foot of the total ground area of the *place and premises* * * * *in or at* which said business is conducted or carried on" (R. 10). It is not confined to the area of land used in the storage business, and was not so construed in the complaints and convictions.

The ordinance requires a written application for a license, and that:

> "Said application shall also be accompanied with a deposit to cover the license fee for the current year in the amount hereinafter provided" (Sec. 2). (R. 10.)

The ordinance does not define the term "place or premises" in any way that would indicate to an applicant how much license fee he should submit with his application. Both are indefinite words. Exhibit P-17 (R. 60, 90) shows the radical fluctuations in the amount of coal in storage from year to year, ranging between a maximum of 160,000 tons on January 1, 1942, and a minimum of 12,000 tons on April 1, 1944. It is impossible to foresee how much coal will be mined in any one year, how much of it will be shipped via Erie, or how much will be sent to transit storage at Coalberg.

The record justifies the state of confusion in respect to what license fee is required by this novel ordinance:

(a) For the purpose of preparing the ordinance, the Township Engineer made, and reported, three different area calculations (R. 204-205, 217-219, 238-241, 246-247). An area of one and one-half million square feet including

railroad tracks regardless of their use (R. 249-250), was selected by him as best serving the purpose (at three-fourths of a cent per square foot) of producing a license fee ($11,250) approximating the lost taxes on the coal.

(b) In the complaint on which prosecutors were convicted, the Township officials construed the term "place or premises" at which the business was conducted as "Block 106-D" on the Assessment Map (R. 5), which contains 2,730,296 square feet, on which the license fee would amount to $20,475. That area included all tracks and 1,198,500 square feet of unoccupied land. (Ex. P-2, R. 18, 76).

(c) In his cross examination of Independent's President, Appellees' counsel intimated that a license application might have been made for 630,000 square feet of area (R. 146), which was the area of the coal "floors", only, and would require a license fee of $4,175. This is the smallest fee anywhere suggested in the record. That area, however, was obviously insufficient because it included only the floors upon which coal is piled, and did not include the additional areas occupied by other buildings, equipment and facilities necessary to the operation of the storage plant, and necessary to the use of that coal floor area. If only the area used for plant operations is included the annual license fee would be $12,545.97.

(d) When Appellants' attorneys sought to ascertain exactly who was to determine what area was intended by the term "place or premises" mentioned in the ordinance, they received only evasive answers such as are included in the following statement of Appellees' counsel who designed and prepared the ordinance:

"Mr. Minard: Who would make the determination for the purpose of making the licensing fee?

Mr. Chandless: You will find under section 1 or section 2, to make an application and ask for a license for a given area; you can ask for forty or fifty square feet, if you want it.

Mr. Minard: Who determines the licensing fee? Could the operator of the plant say that he wants a license fee for 100,000 square feet?

Mr. Chandless: Yes. * * * If he uses more than that 100,000 feet he might be convicted before a recorder * * * of using premises unlicensed. * * * By the same token, if you get your license, for the area that you want it, and then you went and stored coal outside of that area, you then would come under proper proceedings and you would be convicted of violating the ordinance because you were storing coal in premises not licensed, so far as you extended beyond the area prescribed by the ordinance" (R. 246).

The trouble with that "explanation" is that the ordinance does not confine the licensed area to that used for "storing coal." It applies to the "place or premises" where the business is conducted.

That explanation bluntly states that an applicant must, on January 1 of each year, speculate, at the peril of fine and imprisonment, how much area an unpredictable volume of business will require during the succeeding year. The employees of the business are in an equally helpless situation. That explanation of counsel puts the ordinance in the class of a trap, since, if an unexpected amount of coal should suddenly arrive, it could not be unloaded until the operator had rushed to the Township for additional licensed area and paid another license fee.

A common carrier cannot refuse shipments or tariff services without being liable for consequential damage.

The court below suggests (R. 273):

> "And under the ordinance in the case at hand, the warehouse corporation may protect itself against the inclusion of areas not devoted to storage in the calculation of the tax."

That suggestion is not helpful, since the ordinance does not limit the licensee to areas "devoted to storage", and if, when the application was presented, the Township Committee thought enough tax had not been offered it could withhold the license. If, afterwards, it thought more revenues should be obtained, it could revoke the license, or if it thought that more than the licensed area was being used it could prosecute the licensee (R. 246). Hence, the matter does not rest in the hands of the applicant, and it cannot "protect itself against the inclusion of areas". The Township Engineer's idea of the storage area was 1,500,000 square feet, which included all railroad tracks of N. Y. S. & W. railroad as well as those used for access to the storage plant, (R. 249-250). He selected that area as his opinion of the area used for storage and handling purposes. He admitted that there might be a difference of opinion as to the correct area, but he stated that that was up to the Township Committee to decide (R. 217-219). When the Township Committee did decide, it prosecuted, and convicted, Independent and Thompson on the basis Block 106-D, containing an area of 2,730,296 square feet (R. 7), which included, not only all of the railroad tracks included by its Engineer but also, 1,198,500 square feet of entirely vacant and unused land (Ex. P-2, R. 18, 76). That area would require an annual license fee of $20,475.

The Comptroller of the Coal Company (R. 86) testified that since there is nothing in the ordinance limiting the area to be computed to the actual area occupied by stored coal, buildings and equipment, it might be construed by the Township officials to apply to the entire area of the property, 67.25 acres, or 2,929,410 square feet, resulting in an annual license fee of $21,970.57. He also testified (R. 101) that he didn't know how many square feet are necessary to store the coal.

The President of Independent testified (R. 145) that he did not know what area is actually used for storage purposes.

The Court below held (R. 273):

> "There is a presumption that the tax is reasonable in amount; and the burden rests upon the challenger to overthrow that presumption. It has not been sustained here."

thus overruling the New Jersey Supreme Court which held that the ordinance was "an unreasonable, arbitrary, capricious and discriminatory exercise of the licensing power" (R. 256).

In the light of so much confusion and uncertainty on the part of the draftsman of the ordinance, the Township Engineer and the Township officials who have construed it in the complaints, as to the meaning of the ordinance, it is obvious that an applicant for a license could not be better informed. He could not obtain a license until his application had been approved by the Township officials, and they have construed the ordinance as applicable to the whole of Block 106-D. From this conflict of construction among

the Township officials, the uncertainty of the ordinance in this respect, is clearly demonstrated.

From these provisions and actions it is clear that the ordinance is construed to give to the Township Committee the discretion to determine the area to be used in computing, and thus determine the amount of, the license fee, without any controlling definition, rule or guide as to the extent of the "total ground area" to be measured by the unit square foot rate.

It is easily conceivable that the members of one Township Committee may at one time, as they have done in the present complaints, arbitrarily decide upon a given area, and that the same, or different, members of the Committee in office in the next, or any succeeding, year may decide upon a different area, and that the licensee may, by means of such variations, easily become the victim of schemes to increase the public revenue by such means, without any new ordinance being enacted for that purpose, and no notice of the increase. Prosecutors would never know, from one year to the next, what the license fee would be for any year.

With the discretionary opportunities above mentioned, this storage business at Coalberg can be operated only, and entirely, at the mercy of the whim, or discretion, of a governing body possessing the avowed purpose of circumventing a successful tax contest.

> "It is a well-recognized principle that the test of the validity of an ordinance is not what has been done but rather what may be done under its provisions. *Richmond* v. *Model Steam Laundry*, 111 Va. 758, 69 S. E. 932;" *Williams* v. *Richmond*, 14 S. E. (2d) 287, 134 A. L. R. 833, 838.

An ordinance which is susceptible of such a variable exercise of discretion, and opportunity, in fixing, and altering without notice, the amount of the annual license fee, with the possibility of such a wide variance in amounts, is clearly indefinite, and should be declared void.

A tax statute, or an ordinance, which imposes upon the taxpayer the responsibility of making his own calculation of the amount of his tax obligation, at the risk of error on essential features which are admittedly subject to honest differences of opinion (R. 219), and at the peril, not only of being deprived of the right to conduct his business for lack of a license but also of fine and imprisonment as a consequence of such a difference of opinion, is patently ambiguous, unreasonable, and capricious, and denies to that taxpayer the equal protection of the laws and due process of law, in violation of the Fourteenth Amendment of the Federal Constitution. Under such circumstances there can be no justifiable "presumption that the tax is reasonable in amount," because the amount of the tax is not specific and definite, and no one has determined, or knows for a certainty, the correct "amount" of the tax.

(b) Discretionary Powers.

Section 1 of the ordinance (R. 9) forbids the conduct of the business, or to work in, occupy or utilize the place or premises where it is conducted or carried on "unless and until there shall have been granted by the Township Committee * * * and shall be in force and effect, a license to conduct said business for the place or premises in or at which said business shall be conducted or carried on."

The granting or withholding of a license, therefore, rests within the sole discretion, and whim, of the Township Committee, consisting of three members (*R. S. 40: 146-1*).

Section 3 of the ordinance (R. 10) provides:

> "The Township Committee may revoke any such license for sufficient cause after notice and hearing."

No rules, regulations for, or conditions precedent to, the exercise of this power of revocation are prescribed, for the information of the licensees. It, therefore, rests within the power of the Township Committee at any time to revoke an ordinance once granted for whatever "cause" the majority of the members deem satisfactory. There is no provision in this, or any other, ordinance, or under any law, entitling the licensee to a refund of any part of the license fee in case of revocation.

These are arbitrary powers, and may be arbitrarily exercised at any time. In these respects the ordinance is indefinite, uncertain, arbitrary, unreasonable and unlawful.

The ordinance is so drawn as to repose in the Township Committee the uncontrolled discretion to determine for themselves whether the amount of the license fee offered with the application is adequate, according to its notion, before it is determined what land area should be included in the computation of the license fee; and to grant or deny the application, according to their individual notions, or motives, without any expression of reasons for a denial if that course should be taken. While such a dispute was being settled by litigation, the operation of the business must be discontinued, or continued at the risk of heavy

cumulative penalties. But, before the transit facilities and services could be discontinued it would be necessary for Erie to file a new tariff with I. C. C. cancelling the storage in transit provisions of the present tariff. Under the provisions of Sec. 15 (7) of the Interstate Commerce Act (49 U. S. C. A.), I. C. C. could, on complaint of a shipper or on its own motion, suspend the tariff proposing termination of the transit services and Erie would be compelled by law to continue the business, despite the fact that no license had been obtained for the conduct of the business. This sharp conflict between the provisions of the ordinance requiring, as a condition precedent to the conduct of the business, the obtaining of a municipal license and the pre-payment of a license fee, and the provisions of the Interstate Commerce Act illustrates the vice inherent in the situation confronting Erie under this ordinance.

The ordinance is also indefinite and uncertain because it gives discretionary power to revoke a license granted thereunder, without prescribing any rules or regulations, governing the exercise of that power, applicable to all licenses.

Where a discretionary power is conferred by statute, it is necessary to prescribe in the ordinance uniform rules and regulations, applicable to all persons, governing the exercise of such power. None are prescribed in this ordinance.

In these respects, this ordinance violates the rules established in *Yick Wo* v. *Hopkins*, 118 U. S. 356 and *In re Wo Lee*, 26 Fed. 471.

One who applies for and obtains such license, and pays the large license fee, has no assurance that his license may

not be revoked in the discretion of the Township Committee, uncontrolled by any specified uniform rules or regulations applicable to all licensees.

The general rule is stated in *33 Am. Jurisp.* Sec. 66, page 382, as follows:

> "The generally accepted principle is that license legislation which vests in public officials a discretion to revoke a license to carry on an ordinarily lawful business, profession, or activity without prescribing definite rules and conditions for the guidance of the officials in the execution of their discretionary power is invalid."

It is not enough to provide, as this ordinance does, that the discretion to revoke a license shall be "for sufficient cause after notice and hearing", without first prescribing in the ordinance the terms, conditions, rules and regulations, or the acts of violation, which constitute a "sufficient cause" applicable to, and determinable in advance, by all persons alike.

There is nothing to prevent the Township Committee from granting a license and collecting a license fee for revenue, up to $20,475. and, at any time thereafter, revoking the license, on any pretext, or ground which a majority of its members might choose to regard as "sufficient cause". Such action might, and in the absence of previously prescribed conditions for revocation would of necessity be, purely arbitrary. No important business can be lawfully subjected to such hazards. In such a case, what would happen to the coal in storage at Coalberg, under shipping contracts and the outstanding negotiated warehouse receipts?

Such action would destroy the only available use of the Coalberg plant and leave prosecutors without any means of recovering back any part of the license fee, and expose Erie to the risk of shippers' damage suits, and the severe penalties of the Interstate Commerce Act for failure to continue these in-transit storage facilities *(49 U. S. C. A., Sec. 10.)*

As elsewhere stated, on ample authority, the test of the validity of an ordinance is what may, and not what has been, done under it.

Such a prospect would be sufficient to discourage an enterprise of this character, perfectly legitimate, useful and harmless in its nature, and amounts to a denial of the legitimate use of private property.

Under the circumstances above described the ordinance is a trap, and the discretionary power here reserved has no proper relation to the purposes of the enabling statute or to any legitimate purpose of this ordinance.

The power to deny the application, and the unlimited power of revocation standing, as they do, as a threat to all who may apply for licenses thereunder, constitutes an important feature which renders the ordinance arbitrary and unreasonable.

IV.

The ordinance exposes appellants to, and imposes, excessive fines and penalties and thereby denies to appellants due process of law and the equal protection of the law, in violation of the fourteenth amendment of the constitution of the United States.

(Assignment of Errors, pgf. 3(e) (R. 284); Statement of Points, pgf. VI (R. 288)).

In overruling this contention, the Court below said (R. 274):

> "The penalty prescribed for a violation of the ordinance is imprisonment for a term not exceeding 90 days, or a fine not exceeding $200, or both, with an additional provision that each day during which a violation 'shall continue shall constitute a separate offense;' that the magistrate may, in his discretion, imprison one so convicted for a term of not exceeding 90 days, 'in default of the payment of any fine;' and that execution may issue against goods and chattels to recover an unpaid fine.
>
> We are not called upon to determine the validity of all these sanctions. A fine of $200 was the penalty imposed upon each of the convicted respondents, Independent Warehouses, Inc. and Thompson; and a fine in this amount coupled with imprisonment for 90 days cannot reasonably be deemed excessive in constitutional intendment. Vide., R. S. 40:49-5. The ordinance contains a provision that in case 'any section or part' thereof shall be held illegal or unconstitutional, such invalidity 'shall not be construed as impairing the force and effect of the remainder of the ordinance.' If it be conceded arguendo that the

cumulative penalty clause is invalid in whole or in part, the remainder of the provision for sanctions is severable and would stand unaffected."

Except for the penalty provision, this ordinance is impotent and unenforceable. Since it was the convictions and penalization of Independent and James Thompson that was directly under review, the validity of section 7 of the ordinance (R. 11), providing these enforcement and penalty provisions, was a determinative question necessary for sustaining the convictions and penalties, and is the essence of the validity of these convictions.

The severability provision of section 8 of the ordinance (R. 11) provides:

"In the event that any section or part of this ordinance shall be held illegal or unconstitutional, such invalidity shall not be construed as impairing the force and effect of the remainder of the ordinance."

If Section 7 was held to be invalid the convictions and penalties under direct review could not be sustained. Hence, the validity of that section was necessary to a proper determination of the case before the Court below, and it was its duty to pass upon this issue.

In *Erie R. R. Co.* v. *Purdy*, 185 U. S. 148, the court said:

(p. 152)

"But the defendant insists that the general allegation in each of its answers; namely, that the statute besides being void as a regulation of interstate commerce, was in violation 'of various other provisions' of the Constitution of the United States, was suffi-

cient to have enabled him, at the trial, to insist that the statute upon which the actions were based was repugnant to the 14th Amendment of the Federal Constitution. If the answer had contained no such specific allegation, still, if at the trial of the case the defendant had, in stating the grounds of his motion for non-suit, or in some other way, distinctly claimed that the statute on which the actions were based was inconsistent with that Amendment, *then it would have been the duty of the court of appeals* to determine the question so raised, unless it was waived by the defendant when the case was before that court, or unless its determination could properly be and was placed upon some ground of local or general law adequate to dispose of the case. We state the matter in this way because, as said in *Carter* v. *Texas*, 177 U. S. 442, 447, 44 L. ed. 839, 841, 20 Sup. Ct. Rep. 687, 689, 'the question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a Federal question, *in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the state*'." (Italics ours.)

* * * * * * *

(p. 153)

"So, if the highest court of the state, by its final judgment, sustains the validity of a state enactment drawn in question there as repugnant to the Constitution, treaties, or laws of the United States, or denies a right, privilege, or immunity specially set up or claimed in that court for the first time under the Constitution or any treaty, statute, or authority exercised under the United States, this court could

review that judgment, although no Federal question was distinctly raised or insisted upon in the trial court."

* * * * * * *

(p. 154)

"'Of course, if upon examining the record this court had found that a Federal question was properly raised, or that a Federal right or immunity was specially claimed, in the trial court, *then our jurisdiction could not have been defeated by the mere failure of the highest court of the state to dispose of the question so raised, or to pass upon the right or immunity so claimed.*" (Italics ours.)

Section 7 of the ordinance (R. 11) provides, *without the authority of any New Jersey statute*, that "Each day that a violation of any of the terms or provisions of this ordinance shall continue shall constitute a separate offense," and that failure to pay a fine subjects the "person" offending to a compounded *additional* 90 days imprisonment for each offense. The ordinance also provides for execution on the goods and chattels of any person, firm or corporation convicted of violation to satisfy the amount of the fines imposed. Thus a person may lose *both* his estate and his liberty, for the same offense.

This cumulative penalty provision presents threatened monthly aggregations of fines amounting to $6,000 for Independent, the Coal Company and the Railroad Company compounded at the rate of $200 per day, plus execution against the violator's estate for each compound penalty incurred, and 2,700 days of imprisonment for each of their

officers and employees, while this ordinance is being contested,

The only statutory authority for penalties of $200 fine, or 90 days' imprisonment, is found in R. S. 40:49-5 which relates only to ordinances adopted under the authority of sub-title 49 (R. S. 40:49-1). That section has no application to revenue licensing ordinances, which are authorized by the separate and distinct authority of sub-title 52.

16 Corpus Juris Secundum, page 1107:

> "*Excessive or unreasonable penalties.* The imposition of an unreasonable penalty constitutes a denial of equal protection of the laws. A statute which subjects persons or corporations to such excessive or unreasonable penalties for its violation as to intimidate such persons or corporations and to deter them from contesting the validity of the statute in the courts is void as a denial of the equal protection of the laws."

12 Am. Jur. p. 251 states that if the legislature, in an endeavor to prevent challenge of a law provides for such excessive penalties that the party affected is necessarily intimidated and submits, rather than risk penalties in testing it, such a law may deprive a person of the equal protection of the laws.

In *Wadley S. R. Co.* v. *Ga.*, 235 U. S. 651, 662, the court said:

> "A statute, therefore, which imposes heavy penalties for violation of commands of an unascertained quality is, in its nature, somewhat akin to an *ex post facto* law, since it punishes for an act done when the

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legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position where he himself must, at his own risk, pass upon the question. He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order. If a statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality, the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid."

The court held that (p. 667), in considering whether the penalty is excessive, the constitutionality is not to be decided by the conduct of the plaintiff in error nor "by the fact that the state only asked for a penalty for one day's disobedience instead of many."

In *Ex Parte Young*, 209 U. S. 123, the court found that the penalty was so high that the railroad would have difficulty in finding employees to carry on its affairs (p. 145), and that the result precluded a resort to the courts. The essence of the decision on this point is contained in the following quotation:

(p. 145):

"Coming to the inquiry regarding the alleged invalidity of these acts, we take up the contention that they are invalid on their face on account of the penalties. For disobedience to the freight act the officers, directors, agents, and employees of the company are

made guilty of a misdemeanor, and upon conviction each may be punished by imprisonment in the county jail for a period not exceeding ninety days. Each violation would be a separate offense, and, therefore, might result in imprisonment of the various agents of the company who would dare disobey for a term of ninety days each for each offense. * * * It would be difficult, if not impossible, for the company to obtain officers, agents or employees willing to carry on its affairs except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided for in violating orders of the commission. The company, in order to test the validity of the acts, must find some agent or employee to disobey them at the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity."

(p. 163). It was suggested that the law could be disobeyed once and then tested, the law being obeyed, meanwhile. The court observed that several years might elapse before there could be a final determination and if the law was invalid, the property of the company (as in the present case) might have been taken with no possibility of its recovery. The court held that to run the risk of heavy penalties and then seek a review should not be required of the company. Injunction against enforcement was held proper until the validity is determined.

Edwards & Browne Coal Co. v. *City of Sioux City*, 213 Ia. 1027, 240 N. W. 711, involved an action in equity to restrain the city from enforcing an ordinance licensing com-

panies storing oil for sale. Penalties of not over $100, or a prison term of not over 30 days, were provided. Each day constituted a separate offense.

The court held that the ordinance was void because its penalties were excessive.

In *Federal Trade Commission* v. *Millers' National Federation*, 23 Fed. (2d) 968, an injunction was sought to set aside subpoenas *duces tecum* issued by the Commission. One of the questions involved was the jurisdiction of the court of equity to restrain threatened enforcement of criminal penalties on the ground that the terms of the statute were such that the only avenue open to test its validity was through disobedience and therefore a denial of a hearing and lack of due process. The court held that if the statute in that case compelled the individual to subject himself to criminal prosecution, as a condition precedent to inquiry into the power or jurisdiction of the commission to act, it amounts to a deprivation of equal protection of the laws, citing and quoting from *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 102.

The penalty imposed by the act was a forfeiture of $100 per day for disobedience. The court said (p. 971):

> "A corporation is not required to subject its agents or officers to such a hazard as a condition precedent to its right to be heard in a court of justice."

It also mentioned the difficulty which might arise in finding employees or agents who would risk the penalty.

Ex parte Young, 209 U. S. 123, and *Terrace* v. *Thompson*, 263 U. S. 197, are cited as authorities.

The fact that cumulative penalties were not imposed on any of these appellants, or their officers and employees, does not affect this point, since the test of the validity of the ordinance is not what has been done, but rather what may be done under this provision, *Richmond* v. *Model Steam Laundry*, 111 Va. 758, 69 S. E. 932; *Williams* v. *Richmond*, 14 S. E. (2d) 287, 134 A. L. R. 833, 838; *Spann* v. *Gaither*, 52 Md. 1, 136 Atl. 41, 45; *Edwards & B. Coal Co.* v. *Sioux City*, 213 Iowa 1027, 240 N. W. 711; *Ulman* v. *Baltimore*, 72 Md. 587, 609, 11 L. R. A. 224, 227; 37 *Am. Jur.* sec. 156, page 768.

Those who conduct, or are employed in, this business are constantly exposed to additional penalties under this cumulative provision, and wholesale complaints, and convictions, are possible at any time.

V.

The New Jersey Court of Errors and Appeals erred in reversing the judgment of the New Jersey Supreme Court, and in affirming the judgments of conviction of appellants, Independent Warehouses, Inc., and James Thompson, by William Scheele, Recorder of the Township of Saddle River.

(Assignment of Errors, pgf. 1 (R. 281), Statement of Points, pgfs. I to IV, inclusive, and V. and VI (R. 287-288).)

For the support of this point, appellants rely upon the facts, arguments and authorities above set forth under points I to IV, inclusive, of this brief.

Conclusion.

For the reasons above set forth, appellants pray that the judgments of the New Jersey Court of Errors and Appeals here under review in the above entitled causes be reversed, and judgments entered in favor of appellants.

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IN THE

Supreme Court of the United States

No. 83, October Term, 1946.

INDEPENDENT WAREHOUSES, INC., PENNSYLVANIA COAL COMPANY and ERIE RAILROAD COMPANY,

Appellants,

vs.

WILLIAM SCHEELE, Recorder of the Township of SADDLE RIVER, and the TOWNSHIP OF SADDLE RIVER, a municipal corporation of the State of New Jersey,

Appellees.

JAMES THOMPSON,

Appellant,

vs.

WILLIAM SCHEELE, Recorder of the Township of SADDLE RIVER, and the TOWNSHIP OF SADDLE RIVER, a municipal corporation of the State of New Jersey,

Appellees.

ON APPEAL FROM THE NEW JERSEY COURT OF ERRORS AND APPEALS.

APPELLANTS' REPLY BRIEF.

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Twelfth Annual Report of State Tax Department of N. J. (1943) p. 127 3

This reply brief is limited to such parts of Appellees' brief, received November 8, 1946, as require answer. Some of the decisions cited in Appellees' brief are discussed in Appellants' main brief. Some of them are not mentioned herein because they are manifestly inapposite. Others are mentioned herein for reasons hereinafter indicated.

References herein to Appellees' brief are indicated by the initials "AB" with page numbers.

General Observations.

(a)

The Statement of the Case (pp. 2-9) and the argument under Point I, in Appellees' brief, proceed entirely upon the theory that the coal while stopped at Coalberg was not in interstate commerce. That is the central and controlling issue presented under Point I of Appellants' main brief. So complete is Appellees' reliance upon that theory that they do not deign to notice any of the decisions, or authorities, upon which Appellants rely in Parts (14) and (15) of the Statement (pp. 35-45), and Point I (pp. 46-98), of Appellants' main brief as support for an opposite contention. None of the cases cited in Appellees' brief involve in-transit, or other facilities or services governed by the Interstate Commerce Act or transportation tariffs published and filed pursuant thereto.

(b)

Appellees' argument admits, in effect, that the purpose of this license exaction was to obtain revenue *from those who conducted* the business at Coalberg (who did not own, and were not taxable for, any of the coal in storage) in lieu of the ad valorem taxes previously *levied against the*

owners of the coal, which were set aside by the New Jersey courts in *Pattison & Bowns* v. *Township of Saddle River*, 129 N. J. L. 135, aff. 130 N. J. L. 177, and *Independent Warehouses, Inc.* v. *Township of Saddle River*, 129 N. J. L. 137, aff. 130 N. J. L. 217, because the coal was exempt from taxation under the New Jersey tax laws.

The complaint (p. 4) of the loss of revenues through the tax exemption statute which was sustained by those decisions, is one that the courts cannot remedy. The only recourse is to the legislature.

(c)

The principal argument throughout the brief is that, by the "device" of commercial storage, Appellants, or some of them, sought to escape their fair share of the tax burdens necessary for the support of the government. This is not the fact.

The decision in *Knoxville & O. R. Co.* v. *Harris*, 99 Tenn. 684, 53 L. R. A. 921, cited and quoted at pages 39-40 of Appellees' brief in support of this argument, rather defeats the purpose of the citation. The quotation itself shows that, in that case, the state tax was sustained by the state court because the tax in question applied only to railroads "not paying an ad valorem tax to the state", and because those railroads "are not otherwise making *any* contribution to the support of the state government that protects their business and property in the same manner that it does those of the companies of the other class, which are contributing their part to that support by the payment of an ad valorem tax." The railroads that were free from the particular tax in question in that case were those paying ad valorem taxes. This record shows that all ad valorem and other taxes leviable under New Jersey law are being

regularly assessed upon, and paid by, each of these Appellants (Appellants' main brief, pp. 86-93). The tabulation on page 13 of Appellants' main brief shows that ad valorem taxes were levied upon all of the real and personal property at the Coalberg plant ($7,770.98 per year) as admitted at page 87 of Appellees' brief.

It is argued that the per-ton rate of the tax imposed by the license fee is less than the per-ton rate that would have been applicable under ad valorem taxes on the coal at the local tax rate (p. 4). This argument overlooks the following important points:

(1) The coal was exempt from the taxation under the laws of the state, which is a legislative, and not a judicial, matter.

(2) The per-ton rates mentioned in support of that argument at pp. 4, 47-48, were calculated on hypothetical bases of tonnage and areas, and not upon actual tonnage in storage at any time or actual areas used at any time for coal storage, as is shown in Appellants' main brief (pp. 140-143). The record shows that, as construed by the Township officials in the complaints and convictions, the ordinance would impose the equivalent of a tax of $1.50 for each ton of coal stored in 1943 (R. 87).

(3) An ad valorem tax on the coal that would have been levied by the Township, included taxes levied for the support of the state and county governments, namely, state schools, county government, county hospitals, and District Courts, *Twelfth Annual Report of State Tax Department of N. J.* for the year 1943, p. 127; officially published pursuant to New Jersey laws (R. S. 54:1-13).

Hence, Appellees' comparison of rates-per-ton fails to distinguish between the license tax which would go entirely

to the Township government, and ad valorem taxes of which only a part belonged to the Township government.

(4) The amount of the license fee, or tax, per ton of coal, or otherwise, is immaterial because the privilege of conducting that business cannot be interdicted, taxed or regulated by local ordinance, *New Jersey Bell Tel. Co.* v. *State Board,* 280 U. S. 338, 346, 347, 349; *Sprout* v. *South Bend,* 277 U. S. 163, 171, 172, and other cases cited in point 4 of Appellants' main brief.

(d)

Appellees' Statement of the Case (pp. 2-7) and their argument (pp. 25-27, 28) is devoted primarily to the support of the contention that there was no change or difference in the nature and conduct of the Coalberg business after February 25, 1939, when Coalberg became a railroad tariff transit station, from the nature and conduct of the business at Coalberg by the private lessees prior to that date. The brief (first line p. 39) admits that Coalberg was "operated as a private warehouse" prior to that date.

Following are some of the examples of such statements and arguments:

AB p. 5: The statement that "aside from the fact that the plant then (after February 25, 1939) carried the name Independent Warehouses, Inc. there was no other change in the method of operation (R. 154)" is incorrect. That record reference relates only to the *duties* of the witness, James Thompson, who was manager of the yard (R. 151). The witness was previously employed by Pattison & Bowns who was the private lessee of the property (R. 154), and he was testifying to his duties prior to the change made "when the Erie took over" (R. 155) on February 25, 1939 (Ex. P-4, R. 20, 83). Prior to that date his duties related only

to "spot storage" rendered for Pattison & Bowns and other private users at the yard (R. 155).

AB p. 5: The statements that the Erie-Coal Company agreement "made no change in the then existing system of *operation*" is incorrect, and the statement that that agreement provided that the Coal Company "would continue its present operation of the storage yard," is true only in the limited sense of the physical operation of the machinery and equipment. The recitals and text of Exhibit P-4 (R. 20, 83) and the uncontradicted evidence (R. 85, 109, 127, 128) unmistakably show that from and after February 25, 1939 the object, purpose, function, and legal effect of the Coalberg facilities and services were radically changed from a private storage yard used solely for the coal owned by, and held in the possession of, private coal dealers, into a public service facility, available to all shippers, provided by an interstate carrier under section 1(3)(a), and other sections of the Interstate Commerce Act, exclusively for the in-transit storage of coal in possession of the carrier during its interstate transportation under through routes and through rates between shipping points in Pennsylvania and ultimate destinations in other states, with a stop-over privilege of in-transit storage at Coalberg under the provisions of tariffs filed with I. C. C.

The case of *Pennsylvania Coal Company* v. *Saddle River Township*, 96 N. J. L. 40 (cited AB, pp. 3, 6, 10, 24, 26), was decided by the New Jersey Supreme Court in 1921, and sustained property taxes levied by the Township upon the coal owned by the Coal Company on October 1, 1919, when Coalberg was used as a private storage yard. Coalberg continued as a private storage yard until February 25, 1939, and personal property taxes on the coal were levied against, and paid by, the individual owners of the coal each year

down to, and including, the year 1939, for which the coal was assessed as of October 1, 1938 (R. S. 54:4-1, 54:4-11).

On December 1, 1938 the private lessees of Coalberg surrendered possession of the storage plant (Ex. P-4, R. 20, 21) and thereafter arrangements were made, effective February 25, 1939, for the use of Coalberg by Erie as a public service facility, available to all shippers, for shipments from any of the stations in the anthracite regions of Pennsylvania, on five different railroads listed in the tariff (Ex. P-12, R. 55, 110), for in-transit storage and servicing of interstate shipments of coal, pursuant to the provisions of an Erie tariff issued January 24, 1939, filed with I. C. C., and effective February 25, 1939, co-incident with the change in the use and operation of Coalberg (Ex. P-4, R. 20, Sections 1 and 2, R. 22). Provision was made in Section 3 of that agreement (R. 22) for an agent to be maintained by Erie at Coalberg authorized to issue warehouse receipts to shippers for stored coal, and Independent Warehouses, Inc. was later designated as such Erie agent. Section 3 of the agreement also provided that Pennsylvania Coal Company would, as agent, and at the sole expense, of Erie, furnish the employees for the physical operation of the plant and equipment.

These changes in the purpose, function and operation of the Coalberg plant had been accomplished before, and were in effect on, October 1, 1939 which was the assessment date for 1940 taxes. The Township levied taxes for 1940 on the coal in storage, as of October 1, 1939, and did so again for 1941 on coal in storage as of October 1, 1940. These taxes were not levied against Erie or Independent or Pennsylvania Coal Company, because neither of them was the owner of any coal. These taxes were levied against the several owners of the coal, *Pattison & Bourne v. Township of Saddle*

River, 129 N. J. L. 135, at page 135 (aff. 130 N. J. L. 177). In that case the taxed owners of the coal contested the assessments and taxes for 1940 and 1941, and they were set aside because the coal was in commercial storage and was exempt from taxation. The opinion of the state Supreme Court in that case shows that nine reasons were assigned by prosecutors for invalidating the assessments and taxes but that the court deemed it necessary to "consider but one of them" (opinion, p. 135).

In the *Pattison & Bowns* case (*supra*) and in the companion case of *Independent Warehouses* v. *Saddle River Township*, 129 N. J. L. 137, aff. 130 N. J. L. 217, the Township sharply contended, as it does here, that there had been no change in the operation of the Coalberg plant, or the status of the coal in storage, as a result of the change made on February 25, 1939, and, therefore, the coal was still taxable by the Township. In fact, that was the decisive issue in those cases. That contention was there overruled, on questions of both fact and law, by the State Supreme Court and its decision was affirmed by the Court of Errors and Appeals. No attempt was made to review that decision in this Court.

Consequently, Appellees' argument of that issue in this case is a *re-argument* of the same contention unsuccessfully urged by the Township in the above mentioned *Pattison & Bowns* and the *Independent Warehouses, Inc.* cases before the state courts.

Hence, as between the Township of Saddle River and Independent Warehouses, Inc. and their privies, respectively, these issues were settled, if not rendered *res judicata*, in the two last mentioned cases.

Appellees' argument is, in this respect, a collateral attack upon those decisions, and an improper attempt to

obtain from this court a decision different from, and in reversal of, the decisions of the New Jersey courts on that issue.

Specific Observations.

"Statement of the Case."

AB p. 3: The decision in *Pennsylvania Coal Co.* v. *Saddle River*, 96 N. J. L. 40 (also referred to at AB pp. 6, 10, 24-25, 26) involved a contest of local assessments of personal property taxes on the coal stored at Coalberg by Pennsylvania Coal Company which had mined, but had not yet sold, the coal. The coal was the sole property, and was in the sole possession, of that company.

The Court held that that case was indistinguishable from *Lehigh & Wilkes-Barre Coal Co.* v. *Junction*, 75 N. J. L. 68 and *Susquehanna Coal Co.* v. *South Amboy*, 76 N. J. L. 412, aff. 77 N. J. L. 796, aff. 228 U. S. 665 (cited at AB pp. 16-17, 19-21) because "no interstate commerce feature being involved" (p. 41). The only questions involved in that case related to the taxability of property affected by the World War I legislation then in effect (pp. 42-43). The storage facilities (Coalberg) were then in private use and were not public service or common carrier facilities for interstate commerce, or operated as a railroad transit station available (as in this case) to all shippers under published and filed tariffs.

AB p. 5: The statement that "The storage yards x x are not located on Erie", is incorrect. Exhibit P-1 (R. 18A, 64) shows that the Coalberg property is located at the intersection of the Bergen County Railroad (which is the Erie freight cut-off) with N. Y. S. & W., and that there is a double track switch connection from the Bergen County railroad directly into the Coalberg storage property.

entirely independent of N. Y. S. & W. tracks. Exhibit P-12, (R. 54-58, 110) shows that Coalberg is a tariff freight station of Erie. In *Pattison & Bowns* v. *Saddle River Township*, 129 N. J. L. 135 (aff. 130 N. J. L. 177) this question was decided by the State Supreme Court, which held (p. 136) that Erie Railroad "trackage feeds the yard"; referring to the Coalberg storage plant.

AB p. 5: The statement that the Erie agreement with the Coal Company (Ex. P-4, R. 20, 83) was made "subsequent" to the Coal Company lease to Independent (Ex. P-5, R. 24, 83) ignores the fact that the Erie-Coal Company agreement was made, and was effective from, February 25, 1939, and the written agreement itself confirmed the agreement as of that date (Ex. p. 4, R. 20, 83; section 1, R. 22).

AB p. 5: While the *single* purpose of the Erie-Coal Company agreement mentioned in the brief, viz; "so that shipments of coal may not be diverted to other competing lines", is a perfectly legitimate one (*Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 41, 44), a perusal of that agreement will show that there were also other legitimate purposes, including:

> "That the said Coalberg Storage Yard will be operated as a public service facility for shippers * * * on Erie lines desiring storage space in accordance with and under rates named in a certain Tariff on file with the Interstate Commerce Commission * * *" (Ex. P-4, R. 20, 83; Section 2, R. 22).

AB p. 5-6: Reference is made to "intrastate shipments", and "local delivery". It is also stated that "The yard does some local business (R. 163)". That statement is part of an isolated sentence lifted out of the context of

the testimony, which, taken as a whole, shows that a minor portion of the stored coal goes by rail (only) to ultimate destinations in New Jersey as a continuation of the original shipping contract from Pennsylvania, as part of the interstate carriage, under the protection of the through routes and through rates, regulations and rules prescribed in the applicable tariff.

The statement at the bottom of page 6 that "The bulk of the business is with the Edgewater, N. J. Coal *yards*", is misleading. The statement of the witness was (R. 163) that "The bulk of the business was with the Edgewater Coal *Docks*", (correctly stated at the top of page 19 of Appellees' brief) which was the point of tidewater transfer "for continued transportation" thence to New York and New England by barges or vessels (R. 164). Most of the coal goes to New York (R. 112).

The fact that some of the coal goes to ultimate destinations in New Jersey is insignificant in this case, under *United States* v. *Erie R.R. Co.*, 280 U. S. 98, and other cases cited at pages 68-77 of Appellants' main brief. The uncontradicted evidence is that; (a) no coal is sold at Coalberg; (b) every ton of coal moves out of storage by rail under the protection of the through rate and as an originally intended continuation of the interstate carriage under the original shipping contracts from the mines in Pennsylvania, with the intention and contracts of both shipper and carrier that Coalberg should not be its final destination. The only possibility of any of this coal moving in intrastate commerce is in the event that a shipper violates the storage time limit of the tariff, and then makes a local shipment from Coalberg to some final destination in New Jersey (Ex. P-12, R. 54-58, 110, Rules (d), (e), p. 3), under a new intrastate shipping contract at local rates. There is no evidence that such a thing ever occurred. The tariff expressly provides

that its rates "do not apply for local delivery" (Rule (e) p. 3, R. 56) and that they "apply only to Rochelle Park (Coalberg), N. J., when for storage and reshipment" (Rule No. 1, p. 4, R. 57).

AB p. 6: The statement that "These Tariffs had existed since 1906" is not supported at record page 123 (as cited), or elsewhere in this record. The uncontradicted evidence is that the first transit tariff for the storage of coal by the railroad at Coalberg was issued January 24, 1939, effective February 25, 1939 (R. 54-58, 110).

AB p. 6: The statement that the agent maintained at the yard for the issuance of warehouse receipts "had been there for that purpose since at least 1929" creates an erroneous impression. The testimony referred to (R. 153, 154, 157, 158), shows that the witness, Thompson, had been employed, prior to February 25, 1939, by different employers, for the purpose of keeping records of warehouse receipts issued to individual private owners who requested "spot storage" for their coal. All this was changed "When the Erie took over" (R. 155) on February 25, 1939.

AB p. 6: The statement that at Coalberg "the coal leaves the possession and control of the common carrier and is delivered into the custody of the Warehouseman", is a distinction without a difference, since the warehouseman is the agent of the carrier. The applicable Tariff (Ex. P-1, R. 54-58, 110) clearly shows that the intention of the shipper and the carrier, and the actual fact, is that during storage, the carrier continues in possession of, and has a responsibility for, the coal under through shipping contracts.

AB p. 6: Appellees claim that shippers are given a "rebate" in the form of "free storage" at Coalberg (AB

pp. 5, 6, 13-14, 28, 46, 48). The same contention was presented, and argued, on behalf of the Township of Saddle River, in *Pattison & Bowns* v. *Saddle River Township*, 129 N. J. L. 135 (aff. 130 N. J. E. 177). On that issue the Court held:

> (p. 136) "Defendants next urge that 'no charge is made for storage' and therefore Independent Warehouses, Inc., is not 'engaged in the business of storing goods for hire'. In this argument, defendant fall into error. The storage charges are included in the tariff rates charged by Erie Railroad, whose trackage feeds the yard in question."

Whether the shipper receive "rebates" in the form of "free storage" is obviously a question foreign to the issues of, and cannot be collaterally raised or decided in, this case because they are questions which must be first presented to, and be considered and determined in an appropriate proceeding before, I. C. C. which has exclusive and plenary jurisdiction thereof under the Interstate Commerce Act.

In *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291, the Court said:

> "Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission."

The reason for that ruling is given in the succeeding portion of that paragraph of that opinion (p. 291).

"Unjust discrimination", as defined in the Interstate Commerce Act, includes "any special rate, *rebate*, drawback, or other device," &c. (49 U. S. C. A., sec. 2).

In *U. S.* v. *Wabash R. Co.*, 321 U. S. 403, 411, the Court said:

> "In determining whether there is a prohibited unjust discrimination or undue preference, it is for

> the Commission to say whether such differences in conditions exist and whether, in view of them, the discrimination or preference is unlawful."

The case of *B. & O. R. Co.* v. *United States*, 305 U. S. 507 (cited at pp. 14 and 46 of Apellees' brief) is an example. That decision reviewed an order of I. C. C. based on full findings of fact by the I. C. C. after hearing, whereas in the instant case there has been no hearing nor findings of fact by the Commission. Moreover, the *B. & O.* case is limited as a precedent to the special facts there involved. The Court at page 524 recognizes this explicitly by stating:

> "This is not to say that for every situation it is necessary that accessorial services should be rendered at not less than cost, rather than market or fair value. The Commission pointed out it was not condemning bona fide *storage-in-transit* for milling, manufacturing or processing, but only the storage practices indulged in here to get rail transportation." (Italics ours.)

AB p. 7-8: At this place the brief quotes from, and elsewhere (p. 6) refers to and cites, exhibits D-4, and P-11, which were omitted "as unnecessary" in the printing of the record in this Court. Notwithstanding that omission, Appellees' counsel have quoted from and cited those two omitted exhibits in support of his statements and argument.

Pursuant to Rule 13, pgf. 9, of the rules of this Court, Appellants filed their designation of record to be printed in this Court (R. 289). That rule imposed upon Appellants' counsel the duty to avoid an unnecessarily voluminous record by omitting all matter which he deemed unnecessary to the case on appeal. In the performance of that duty, Appellants' counsel designated as unnecessary certain spe-

cific parts of the record below, including exhibits D-4 and P-11. That designation was served upon Appellees' counsel (R. 289).

Paragraph 9 of Rule 13 also provides:

> "The adverse party, within ten days after service of the * * * designation required to be filed by appellant may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the appellant. The parts of the record so designated by one or both of the parties, and only those parts, shall be printed by the clerk."

Appellees' counsel did not file any designation of additional parts of the record which he thought material.

While it lies within our power to refute the implications of Appellees' brief relative to exhibits D-4 and P-11, by the use of other parts of those documents, we feel bound by the Rule above quoted to refrain from doing so. By the same token we believe that Appellants' counsel has improperly used, cited and mentioned those exhibits in his brief, and that the Court will either order such references stricken from Appellees' brief, or disregard them, and the statements and arguments based thereon, in its consideration of the case.

"Summary of the Argument."

AB p. 9: The decision in *Susquehanna Coal Co.* v. *South Amboy*, 228 U. S. 665 (decided in 1913), (and elsewhere referred to AB pp. 16, 19, 27) is cited in support of Appellees' contention that the interstate commerce status of the coal ceased when the coal was placed in storage at Coalberg. That case involved an entirely different state of facts. The

Susquehanna Coal Company mined the coal and shipped it to itself for future sale at South Amboy, where the shipping contract ended and the carrier made final delivery of the coal to the consignee. The Court sustained the property tax on the coal because the intended transportation movement had ended. There was no question of railroad transit storage, transit tariffs, or of through billing, or through routes or through rates from point of origin in Pennsylvania to ultimate destinations with stop-over privileges for in-transit storage and servicing.

In *Lehigh & Wilkes-Barre Coal Co.* v. *Junction*, 75 N. J. L. 922, (referred to at p. 28 of Appellees' brief) the New Jersey Court of Errors and Appeals sustained a property tax on coal under the same circumstances as in the *Susquehanna Coal Company* case.

On the contrary; under circumstances similar to those in the present case, the New Jersey Supreme Court set aside property taxes levied on coal in two cases, which have never been overruled, namely, *State* v. *Engle*, 34 N. J. L. 425, (decided in 1871) and *Lehigh & W. B. Coal Co.* v. *Carrigan*, 39 N. J. L. 35 both of which were distinguished from the case of *Lehigh & W. B. Coal Co.* v. *Junction*, 75 N. J. L. 922, at page 933, by the New Jersey Court of Errors and Appeals. The New Jersey court decision in *Lehigh & W. B. Coal Co.* v. *Carrigan*, was cited with approval by this Court in *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95, 102, as authority for the contention Appellants make in the present case.

POINT I.

AB pp. 11, 26: Appellees' attempt to state Appellants' contention is inaccurate. An accurate statement of Appellants' contention in this respect is that, the license was

required as a prerequisite to the right of the Erie Railroad Company, a common carrier, to perform in-transit storage of shipments of anthracite coal moving in interstate commerce from mines in Pennsylvania to destinations in other states. The coal, while held in storage pursuant to tariffs filed with the Interstate Commerce Commission, was in the exclusive custody and possession of the Railroad Company. The coal is not subject to delivery or other local disposition at the storage point and the owners merely have the right to have the railroad transportation service completed for the movement beyond the storage point to ultimate destinations. Joint through rates applicable from the mines to final destinations are charged, plus a storage-in-transit charge, as shown in tariffs filed with the Interstate Commerce Commission.

AB p. 27: The statement that the shippers "were dealers in coal in quantities of from 50,000 to 100,000 tons (R. 166)" is erroneous, insofar as this record goes. We know nothing of the volume of tonnage dealt in by these shippers, except to the extent of their shipments through Coalberg. At that page the record shows that those were purely suppositious figures, qualified by the word "might", used by Appellees' counsel in a question on cross-examination. Exhibit P-10 (R. 49, 87-88) shows "Gross tons handled" in and out during 1941, 1942 and 1943. Exhibit P-17 (R. 60, 90) shows the actual amount of the various kinds of coal in storage on the first day of each month in 1942, 1943 and eight months of 1944. Those figures were never questioned, and they show that the purely suppositious figures above quoted from Appellees' brief are incorrect. The maximum and minimum total tonnages in storage of all kinds of coal and for all shippers, were as follows:

Year	Tons maximum	Tons minimum
1942	160,487.25	80,791.00
1943	96,771.80	19,360.00
1944	24,241.95	12,661.80

AB, p. 29: The statement that Chapter 162, N. J. P. L. 1945, p. 563, relating to franchise taxes "was not in effect when the convictions were had in the present case", is correct, and is so stated in Appellants' brief, but Appellees' brief neglects to mention R. S. 54:32A-8 (quoted in Appellants' brief, pp. 87-88), which was in effect at that time and provided for the imposition of franchise taxes exclusively by the State government, and franchise taxes were levied by the state upon, and were paid by, each of the corporate Appellants, including franchise taxes levied against Erie, part of which was allocated among, and paid to, the municipalities of the state, including the Township of Saddle River (Appellants' brief, pp. 90-92).

Appellees' brief contains the following significant quotations from cases there cited (italics ours):

> (p. 15) "The like taxation of property, shipped interstate, *before the movement begins, or after it ends*, is not a forbidden regulation" (italics ours).
>
> (pp. 15-16) "the merchandise has been transported in interstate commerce *and brought to its journey's end.*"
>
> (pp. 22-23) " x x the cotton x x, *has not begun to move in interstate commerce.*"

The important distinction in the present case is that interstate commerce has commenced, and it has not ended at the storage point. All of the parties to the shipping transaction, the shipping contract itself and the tariff, intended, and require, further rail transportation. The tariff expressly forbids local delivery at the storage point, and no facilities for local delivery are there provided.

POINT II.

The argument and authorities in Appellees' Point II are fully covered in Appellants' Point II (pp. 106-136), with the exception of the following observations:

AB, p. 31: Attention is called in Appellees' brief to the fact that "Appellants' attack is not against the statutes." In addition to what is said on this subject at pages 47-48 of Appellants' main brief, it is necessary only to note the decision of the Seventh Circuit in *Board of Trade* v. *Illinois Commerce Commission,* 156 Fed. (2d) 33, 36, which held:

> "The case was tried below and is presented here solely on the theory that the state law in question was superseded and rendered inoperative by federal enactment which has 'pre-empted' the field in controversy. If plaintiffs had succeeded below or if they succeed in this court, it would not mean that any provision of the Illinois law or Constitution has been invalidated. It would only mean that such law or constitutional provision is inapplicable to a situation such as the instant case."

That case involved a conflict between state and federal law relative to warehouse regulations, and the enforcement of the state law was enjoined.

AB p. 34: The brief states (p. 34) that the tax exemption of goods in commercial storage provided in R. S. 54:4-3.20 was based "on the ground that it was not entirely practical to correctly levy separate and individual assessments on the varied and often-times transient owners of such goods and that therefore, in some instances, because of the resulting confusion in such assessments, the enforcement of the provisions of the Tax Act in respect thereto brought about hardship and injustice. However, R. S.

54:4-3.20 was never intended by the legislature of New Jersey to grant to the owners of goods stored in public warehouses absolute immunity from paying their share of the burdens of government."

Appellees' brief erroneously infers that the legislature in enacting that tax exemption "reached the conclusion that the public interest would be best served and fully protected by license fees for revenue imposed under the (licensing) provisions of R. S. 40:52-2 * * * and R. S. 40:52-1(g) * * *."

Rule 71 of the Rules of the Assembly (1925), where this bill was introduced, provides:

> "Each member when introducing a bill shall submit with each copy of the bill a statement setting out the objects proposed to be accomplished by its enactment * * *, which statement shall be referred to the Committee with the bill. An equal number of copies of such statement and bill shall be printed and a copy of the statement shall be attached to each copy of the bill," *Fitzgerald's Legislative Manual, State of New Jersey, 1925, p. 628.*

This tax exemption was enacted by Chapter 221, N. J. P. L. 1925, pp. 537, 542. Pursuant to the above quoted rule, there was attached to, and printed as a part of, the bill for that statute introduced in the legislature the following statement:

> "The object of this bill is to enable warehousemen in the State of New Jersey to compete successfully with warehousemen in neighboring states where the property of the patrons of such foreign warehousemen is relieved from taxation. Any loss in taxes would be more than offset by the increased taxable property resulting from their growth if this handicap is removed."

Tax exemption under that act was challenged before the state Supreme Court, in *Schwartz* v. *Essex County Board of Taxation*, 129 N. J. L. 129. At page 133 of the opinion the Supreme Court said:

> "A state, by adjusting its taxing system so as to favor certain industries or businesses does not thereby deny equal protection of the laws."
>
> . . . . . .
>
> "There no longer exists any doubt but that the legislature is competent to classify objects of legislation, and this includes classifications for the purpose of taxation and exemptions from taxation."

Concerning the object of this tax exemption law, as set forth in the above quoted statement attached to the bill for the act, the opinion reads (p. 134):

> "The exemption statute applies to all personal property stored in a warehouse and it includes all property within the state so situated, omitting none. The depositions taken by rule of the court indicate clearly that persons and corporations engaged in the business of storing goods for hire in warehouses were unable to compete profitably with competitors in the neighboring states of Pennsylvania and New York by reason of the fact that those states do not tax personal property; that as a result, goods which might otherwise have been stored in warehouses located in New Jersey, were diverted by the owners thereof to warehouses located in states where the property stored would not be subjected to taxation. In order to place New Jersey warehouses on an equal footing with other competitors in the two states named, the legislature saw fit to grant exemption from taxation on personal property so stored. In *Burlington Distilling Co.* v. *State Board of Assessors*, 86 N. J. L. 92; *affirmed*, 87 Id. 315, the court

> said: 'A legislative policy exhibiting such a liberal scheme of industrial encouragement should not receive a construction so narrow and illiberal as to subvert the very policy which quite obviously such legislation was intended to erect and subserve.' A legislative policy of encouraging industry or business by granting exemption from taxation is both logical and reasonable."

That decision of the state Supreme Court was affirmed, on the opinion below, by the New Jersey Court of Errors and Appeals, *same case*, 130 N. J. L. 177. No attempt was made to review that decision in this court, and the decision in that case has not been reversed, or questioned, in any subsequent decision of the state courts.

The above quoted statement, and court decision, demonstrate two things in this case:

(a) If, as Appellees here contend, there was no change in the method of operation of Coalberg plant after February 25, 1939 when it became a public service facility for in-transit storage of interstate commerce, the owners of the coal would not have paid taxes on the coal, but would have claimed this exemption for each year between March 21, 1925, the effective date of the exemption act, and the tax year of 1940, as the owners of the coal did for the tax years 1940 and 1941.

(b) The object of the bill was an absolute tax exemption, and the legislature did not contemplate the substitution of license fees for revenue as a means of defeating the plainly stated object of the tax exemption, and that statement and decision show that the legislature did not "intend to leave to the municipalities the power to tax under other existing statutes" (AB, pp. 34-35).

AB p. 46: The suggestions that the modifying of the "filed tariff rates" "need not be done if a direct charge for storage be made on the storer by the warehouse company", and, at page 48, that the "license fee" could be "passed along to the buyers of the coal", display a disregard of federal laws in the following respects:

(a) The cost of coal could not be increased by passing this license fee "along to the buyers of the coal". That was prohibited by the Emergency Price Control Act of 1942 (*50 U. S. C. A., Appendix, Sec. 901, et seq.*) and the Inflation Control Act of 1942 (*50 U. S. C. A., Appendix, Sec. 961*), and the O. P. A. regulations issued pursuant to those acts fixing positive ceilings on the prices of coal.

(b) An increase in the storage rates was prohibited under section 942 (c) of the Price Control Act, *Lincoln Savings Bank* v. *Brown*, 137 Fed. (2d) 228, 230.

(c) Any increase in the carrier's tariff charges was restricted by the President's Executive Order No. 9328 (April 18, 1943). Paragraph 4, thereof provided:

> "The attention of all agencies of the Federal Government, *and of all State and municipal authorities, concerned with the rates of common carriers* or other public utilities, is directed to the stabilization program of which this order is a part so that *rate increases will be disapproved* and rate reductions effected, consistently with the Act of October 2, 1942, and other applicable federal, state or municipal law, in order to keep down the cost of living and effectuate the purposes of the stabilization program." (Italics ours.) (50 App. U. S. C. A. pg. 318.)

On October 2, 1942 the Emergency Price Control Act was amended to provide:—

"No common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase" (Title 50, App. U. S. C. A., Sec. 961).

These provisions of the law, and the status of O. P. A. as an intervenor in a public utility rate case, were considered in *Vinson* v. *Washington Gas Light Co.*, 321 U. S. 489 (decided March 27, 1944).

(d) The federal price control acts and regulations limited not only the price of the coal (M. P. R. No. 112, secs. 1340.191, 1340.200; G. M. P. R. (March 11, 1943) Secs. 1499.1, 1499.2, pgf. (a) (1)), but also, the intransit storage rates on coal (M. P. R., Sec. 1340.198, pgf. (t)).

(e) The Interstate Commerce Act (Sec. 15, pgf. 7) requires a 30-day notice of changes in tariff rates, including accessorial charges such as in-transit storage rates, and such changes are subject to suspension by, hearing before, and disapproval of, I. C. C.

(f) The record shows that the Coalberg transit facilities for anthracite coal were the only ones on the Erie lines (R. 112); that this transit service was a necessary element of Erie's competition with other anthracite carriers (R. 112-113); and that the transit storage rates, as well as the transportation rates, for anthracite coal are the same on all competing carriers (R. 114). Obviously, if the transit charges at Coalberg were increased to cover this license fee, an illegal discrimination would result against shippers over the lines of Erie and participating and connecting car-

riers, under this tariff, which I .C .C. would have authority to remove (*Central R. Co.* v. *United States*, 257 U. S. 247, 257).

AB pp. 48-49: The per-square-foot rates of other license fees in the Township are mere self-serving computations. No other business or property in the Township is licensed on a square foot basis. Exhibits P-13 (R. 50-51) and P-14 (R. 52) list all of the other businesses licensed in the Township, and show that only lump sum fees in dollars are prescribed regardless of ground areas. Appellants' main brief (pp. 115-116) gives a comparison of those license fees with the one here in question.

AB p. 49: Here is cited *North Hudson Co. Ry. Co.* v. *Hoboken*, 41 N. J. L. 71. It is significant that that decision held that a municipality could not require the obtaining of a license for, or impose regulations or excise taxes upon, the conduct of the business of a corporation which had its franchise from the state. To the same effect are *State* v. *Jersey City*, 29 N. J. L. 170; *Pennsylvania R. Co.* v. *Jersey City*, 84 N. J. L. 716; *Jersey City* v. *Erie R. R. Co.*, 84 N. J. L. 761.

AB p. 51: Here the argument erroneously states that the "agents, and servants (of Appellants) could continue this business with immunity" "unless the foreign corporate entity" (of some of these corporate Appellants) "appeared of its own volition within the municipal jurisdiction."

This record shows that all three corporate Appellants are authorized to conduct their business in New Jersey. The New Jersey corporation law (R. S. 14:4-2) requires that:

> "* * * every foreign corporation authorized to transact business in this state, shall maintain a principal

office in this state and an agent in charge thereof upon whom process against the corporation may be served."

In default of compliance with that statute, the civil practice act (R. S. 2:26-47) provides that service upon a foreign corporation doing business in New Jersey may be effected by service upon the Secretary of State.

POINT III.

This point needs no answer other than set forth in Point III (pp. 137-150) of Appellants' brief.

POINT IV.

This point needs no answer other than set forth in Point IV (pp. 151-159) of Appellants' brief, except:

AB p. 56: It erroneously states that the penalty clause in R. S. 40:49-5 used in this ordinance "is the penalty clause used for the enforcement of all ordinances in New Jersey." As pointed out in Appellants' brief (p. 155) that section does not apply to licensing ordinances at all. Licensing ordinances are authorized exclusively under Sub-title 52 of Title 40 of Revised Statutes, which is a separate and distinct statutory compartment relating exclusively, and to the exclusion of all other statutory provisions, to licensing ordinances, and the only penalty authority contained in that sub-title is contained in R. S. 40:52-6, which is entirely different from that contained in R. S. 40:49-5.

AB p. 58: The citation of, and quotation from, *D. L. & W. R.R. Co.* v. *Central Stockyard & Transit Co.*, 45 N. J. E. 39, is inapposite, because of the fact that the in-transit facilities and services at Coalberg are provided by a

common carrier in interstate commerce as public service facilities and services *available to all shippers*, and are prescribed in, and governed by, a duly filed tariff. The only limitation upon the obligation of the carrier to comply with the demands of all shippers for such services is the capacity of those facilities (Ex. P-12, 54, 109, p. 3, lines 4-7, R. 56).

AB p. 59: The statement that Appellants failed to make any attack upon this ordinance until after these convictions, is incorrect, and the quotation from *Wadley So. Ry.* v. *Georgia*, 235 U. S. 651 is inapplicable. The Ordinance was enacted January 25, 1943 (R. 7). On April 19, 1943, before any enforcement of the ordinance was attempted, Appellants instituted suit in the United States District Court for the District of New Jersey to enjoin the enforcement of the ordinance and a preliminary restraining order was granted. That action was disposed of by order entered November 23, 1943 (Appellants' brief, pp. 9-10). The first attempt to enforce the ordinance occurred on November 30, 1943, ten months after its adoption, when Independent and Thompson were arraigned and convicted of violation of the ordinance (R. 6). By December 13, 1943, (within 13 days), Appellants had prepared their papers, arranged for a hearing on their application for, and obtained writs of certiorari to review the convictions (R. 1). Certainly, there can be no justification for a charge of delay on the part of Appellants.

AB p. 60: It is stated that Appellants could have "(a) discontinued further business in Saddle River Township until the matter was determined, or (b) paid the license fee under protest and recovered it back in the event they were successful in maintaining their position."

(a) It is idle to say that Erie could have embargoed all shipments of coal in and out of Coalberg, and suspended all warehouse and storage services, and protection, while the applicable tariff was in effect.

Numerous decisions of I. C. C. (of which *Humble Oil & Ref. Co.* v. *Director General*, 73 I. C. C. 275, 276 and *American Mfg. Co.* v. *Director General*, 77 I. C. C. 52, 57 are examples) describe the circumstances under which an embargo is lawful. A tax dispute, or an interdictive ordinance requiring a license as a condition precedent to furnishing the service, is not a lawful justification for an embargo.

Erie could not cancel its storage tariff without the 30-day notice required by section 15, paragraph 7 of the Interstate Commerce Act. Such a cancellation would be subject to possible suspension on complaint of a shipper, or on the Commission's own motion; and, in case of such objection, an order of I. C. C. after hearing, would be required before cancellation could become effective, if I. C. C. approved the cancellation.

Embargoes do not have retroactive effect and are not applicable to cars billed from point of origin prior to the effective date of an embargo notice. *The Transit Case*, 25 I. C. C. 130, 133;

In *Grain Products from Gulf Ports to Atlantic Seaboard* 222 I. C. C. 705, 714, the Commission held:

> "It is well settled that in connection with a through shipment, where the continuity of movement is interrupted under a transit arrangement, the rates in force on the date of the original shipment are applicable. To find otherwise would make it possible to change the rate on a shipment while, under the fiction of transit, it is en route."

See also *Great Atl. & Pac. Tea Co.* v. *Alton R. Co.*, 226 I. C. C. 378, 401.

Hence, neither an embargo, nor a cancellation of the tariff, could affect the carrier's duty to the shipper respecting the coal already in, or en route to, storage.

Any arbitrary suspension of this service would expose the carrier to damage claims by shippers, and penalties under the Interstate Commerce act, not to mention the public hardship of being deprived of the use of coal during winter months.

Nothing which the carrier could do would relieve it of the custody, or its responsibility for the warehousing service, of the coal while it still remained in storage under tariff provisions.

This alternative was neither legal nor practicable.

(b) The ordinance was adopted January 25, 1943, and provided that the license fee should be prepaid in advance on or before the first of January of each year. No attempt to enforce the ordinance was made until November 30, 1943. Under the law of New Jersey, as it then stood, and had stood without change since 1909 (a period of 36 years), *Atlantic City R.R. Co.* v. *Ventnor City*, 77 N. J. L. 354, no license fee was due for the calendar year 1943.

This ground of objection to their convictions was presented by Appellants in the present case in their "Reasons" filed in the state Supreme Court (R. 17, Reason 1, pgf. (n)), but was not ruled on by that Court because the case was decided favorably to Appellants on other grounds (R. 255-257). The same ground was urged and briefed by these Appellants in the Court below, but it, too, decided the case on other grounds, without reference to this point.

Certiorari proceedings in the state Supreme Court after conviction was the appropriate remedy to challenge the

application of the ordinance, and to review the convictions thereunder (R. S. 2:81-13, quoted in Appellants' brief, p. 10). In *Lipkin* v. *Duffy*, 119 N. J. L. 366, the New Jersey Court of Errors and Appeals considered a case in which the party had failed to apply for a license under a municipal ordinance, and prepay the license fee, and sustained the procedure followed by Appellants in the present case. The Court held (p. 369):—

> "When such a situation is presented, it is proper practice to test the ordinance upon *certiorari* after conviction."

No claim was made in either of the Courts below on behalf of present Appellees, or suggested in the opinions of either of those Courts, that Appellants should have adopted either of the alternatives now suggested for the first time.

Under these circumstances Appellants were justified in the course they pursued, and are not subject to criticism for not adopting either of the alternatives (a) or (b) suggested in Appellees' brief (p. 60).

Respectfully submitted,

CLEMENT K. CORBIN and
EDWARD A. MARKLEY,
Attorneys for Appellants, Independent Warehouses, Inc. and James Thompson.

WILLIS T. PIERSON and
DUANE E. MINARD,
Attorneys for Appellants, Pennsylvania Coal Company, and Erie Railroad Company.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1096

INDEPENDENT WAREHOUSES, INC., PENNSYLVANIA RAILROAD COMPANY, ERIE RAILROAD COMPANY AND JAMES THOMPSON,

Appellants,

vs.

WILLIAM SCHEELE, RECORDER OF THE TOWNSHIP OF SADDLE RIVER, AND THE TOWNSHIP OF SADDLE RIVER.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

HARRY LANE,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1096

INDEPENDENT WAREHOUSES, INC., PENNSYLVANIA RAILROAD COMPANY, ERIE RAILROAD COMPANY AND JAMES THOMPSON,

Appellants,

vs.

WILLIAM SCHEELE, RECORDER OF THE TOWNSHIP OF SADDLE RIVER, AND THE TOWNSHIP OF SADDLE RIVER.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

STATEMENT OPPOSING JURISDICTION

The New Jersey Court of Errors and Appeals held valid a municipal ordinance adopted by the Township of Saddle River, a municipal corporation of the State of New Jersey, fixing a license fee on warehouses of three-quarters of a cent (¾ of 1¢) per square foot of ground area, and sustained the imposition on the Appellants, Independent Warehouses, Inc., and James Thompson, its employee, of a penalty

of Two Hundred ($200.00) dollars for violation of Section 1 thereof on a charge of storing coal in a warehouse without first having obtained a license therefor.

The New Jersey Court of Erorrs and Appeals found the following facts:

"The essential facts are not in dispute. The storage plant, commonly known as 'Coalberg,' is owned by the Pennsylvania Coal Company, a Pennsylvania corporation. It comprises 67¼ acres of land and buildings, tracks, chutes, hoppers, scales, machinery and equipment. The owner leased the yard in its entirety to Independent Warehouses, Inc., a New York corporation, at the nominal annual rental of one dollar. These corporations are wholly owned subsidiaries of the Erie Railroad Company, a common carrier in interstate commerce; and under agreements between these parties, the plant is operated by the Pennsylvania Company 'for the benefit and on behalf of,' and at the sole expense of the Erie Company's trustees, 'as a public service facility for shippers of prepared anthracite coal on Erie lines desiring storage space in accordance with and under the rates named in a certain tariff on file with the Interstate Commerce Commission and the Public Utilities Commission of the State of New Jersey, issued January 24, 1939,' and any supplements thereto. The Erie's trustees agreed to maintain an agent at the yard authorized on their behalf to issue warehouse receipts for coal placed therein 'for storage by shippers.' The Pennsylvania Company undertook to remit to the trustees, monthly, the net operating surplus; and the trustees assumed the obligation of reimbursement for the net operating loss, if any. By express provisions, 'taxes are includable in the 'allowable items of expense chargeable against' operation and maintenance. By this arrangement, the Erie's trustees sought to avert the diversion 'of shipments of coal * * * to other competing lines on which facilities for coal storage are available.'

"The agreement with Independent Warehouses, Inc. recites that it was 'the desire and for the interest' of

the Pennsylvania Company that the lessee should conduct upon the premises the 'general business of a warehouseman,' and provides that the lessee shall devote the yard to such purposes, and shall furnish storage therein for 'any and all types of coal * * * tendered to it for warehousing for the account or at the request of 'the Pennsylvania Company (if there shall be available storage space) at the rate of two cents per ton, with a minimum annual charge of $600. There was also a provision for reimbursement of the lessee for its losses, costs and expenses not classable as 'ordinary.' By a supplemental agreement, the storage rate was reduced to one-half cent per ton, and the annual minimum charge to $500. The New York, Susquehanna and Western Railroad Company has certain contractual trackage rights at the yard, and the use of other facilities. Independent Warehouses, Inc. is engaged in the public warehouse business 'at various places in nine states.' For some 15 years prior to the agreement with the Pennsylvania Company, Independent had issued warehouse receipts for coal stored in this yard.

"The Pennsylvania Company owns and operates anthracite coal mines in the State of Pennsylvania. Coal sold at the mines is, by contract with the purchaser, shipped in interstate commerce, over the railroad of the Erie Company, and stored at the Coalberg yard until, at the shipper's direction, it is again conveyed by rail to its ultimate destination. For the in-transit storage, including unloading, reloading, and the incidental services, the shipper pays to the carrier a tariff charge of 28¢ per ton. Free storage is permissible for as long as two years. This storage is designed to meet seasonable deficiencies and shortages due to the excess of consumption over production and to facilitate the financing of purchases through negotiable warehouse receipts, all of which, it is said advance the general welfare as well as serve the particular interests of the mine operators, shippers and carriers. Erie's Coal Freight Agent testified that, when because of seasonal conditions the supply exceeds the demand, 'the operators bill' coal 'to storage, to

store it at an advantageous point for reshipment;' that 'the shipper hasn't enough orders to ship it out directly to destination;' that all the coal 'is consigned to Coalberg, Rochelle Park, for storage, billed at the regular tariff rates from the mine to the storage plant,' and 'it is held there awaiting orders from the consignee as to what is to happen to it.' This course 'relieves the car situation,' and it 'also helps the operator to continue operating.'

"There is an established tariff charge for the storage; and the argument, in brief, is that through the 'contract agencies' of the Pennsylvania Company, as the owner of the plant, and Independent, as a 'public warehouseman,' the Erie Company 'utilizes' this facilities 'solely to provide regular tariff intransit services to its shippers for interstate shipments of coal from the Pennsylvania mines to ultimate destinations through, and beyond, Coalberg, with the facilities provided by the storage of the coal with a public warehouseman, as a regular transportation service facility over its line, pursuant to the demands of shippers;' and that the 'tariff charges for this intransit service are collected by the carriers directly from the shippers, and Erie, and participating carriers, bear the entire expense of the transit facilities.'

"But the coal is shipped to the purchaser or his consignee at Coalberg, Rochelle Park, and freight charges are collected at the rate prescribed for transportation from the mines to that particular point, plus storage and unloading charges; and, when the coal is reshipped, there is, as we have seen, a new billing, to the ultimate destination at the through interstate rate from the point of origin to the new destination, plus reloading charges, 'as a continuance of the original interstate movement,' and the balance is paid by the shipper at Coalberg. The ultimate is not determined until the owner gives shipping instructions. Compare *Federal Compress & W. Co. v. McLean*, 291 U. S. 17, 54 S. Ct. 267, 78 L. Ed. 622.

"Thus the continuity of the carriage in interstate commerce is broken when the carried commodity is unloaded and stored at Coalberg for an indefinite period, subject to the owner's disposal and thereby the coal becomes inter-mingled with the general mass of property having a situs within the State, and subject to the State's dominion and liable to taxation as such; and the stored coal retains that character and status until it is again shipped in interstate commerce."

The Appellants have assigned as errors that the ordinance of the Township of Saddle River is repugnant to the commerce clause, deprives them of property without due process, and denies them the equal protection of the laws.

1

The decision of the New Jersey Court of Errors and Appeals is not reviewable on this appeal because the validity of a treaty or statute of the United States is not drawn in question nor is the validity of a statute of any state drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States. The authority of the Township of Saddle River under the laws of New Jersey to adopt the ordinance in question was settled by the decision of the New Jersey Court of Errors and Appeals and is not open to attack here. *Fischer* v. *St. Louis*, 194 U. S. 361; *Schefé* v. *St. Louis*, 194, U. S. 373.

2

Any Federal question that may exist in the present case has ben so explicitly foreclosed by prior decisions as to afford no basis for an appeal. The present case is identical with *Susquehanna Coal Co.* v. *S. Amboy*, 228 U. S. 665, 35 S. Ct. 712, 57 L. Ed. 1015; *Federal Compress & W. Co.* v.

McLean, 291 U. S. 17, 54 S. Ct. 267, 78 L. Ed. 622; *General Oil Co.* v. *Crain*, 209 U. S. 211, 28 S. Ct. 475, 52 L. Ed. 754; *W. W. Cargil Co.* v. *Minnesota*, 180 U. S. 452, 21 S. Ct. 423, 45 L. Ed. 619.

3

This Court will not review the findings of fact by the New Jersey Court of Errors and Appeals that the business of appellants, required to be licensed by the ordinance in question in this case, was not engaged in Interstate Commerce. The record shows ample evidence to support the findings and that is as far as this Court will enter upon a consideration of the question, *Great Northern R. Co.* v. *Donaldson*, 246 U. S. 121, 38 S. Ct. 230, 62 L. Ed. 616.

4

The New Jersey Court of Errors and Appeals held that "the regulation of foreign and interstate commerce is a subject within the exclusive jurisdiction of the Congress" but that the ordinance in the present case applied only to intrastate commerce. This Court will accept the view of the New Jersey Court of Errors and Appeals as to the scope and operation of the ordinance so that no Federal question arising under the commerce clause of the Constitution is here for determination. *Erie R. R. Co.* v. *Purdy*, 185 U. S. 148, 22 S. Ct. 605, 46 L. Ed. 847.

5

There is no support in the record that the Appellants were deprived in any respect of due process of law or the equal protection of the laws. A reasonable tax was imposed on the Appellants applicable to all in the same general

classification. *MacKay Tel. & Cable Co.* v. *City of Little Rock*, 250 U. S. 94, 39 S. Ct. 428, 63 L. Ed. 863.

For the above stated reasons the motion to affirm is justified, if not the motion to dismiss.

Respectfully submitted,

HARRY LANE,
Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1096

INDEPENDENT WAREHOUSES, INC., PENNSYLVANIA RAILROAD COMPANY, ERIE RAILROAD COMPANY AND JAMES THOMPSON,

Appellants,

vs.

WILLIAM SCHEELE, RECORDER OF THE TOWNSHIP OF SADDLE RIVER, AND THE TOWNSHIP OF SADDLE RIVER.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

MOTION TO DISMISS APPEAL OR AFFIRM DECISION OF STATE COURT

The Appellees, William Scheele, Recorder of the Township of Saddle River, and the Township of Saddle River, a municipal corporation of the State of New Jersey, move to dismiss the appeal herein on the ground that the case presents no substantial Federal question and a further move,

if the motion to dismiss is not granted, that this Court affirm the decision of the New Jersey Court of Errors and Appeals on the grounds that the questions on which the decision of this cause depends are so unsubstantial as to leave no further argument, all as appears in the Statement Opposing Jurisdiction of this Court filed herewith.

HARRY LANE,
Counsel for Appellees.

(4536)

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IN THE

Supreme Court of the United States

No. 83, October Term, 1946.

INDEPENDENT WAREHOUSES, INC., PENNSYLVANIA COAL COMPANY and ERIE RAILROAD COMPANY,

Appellants,

—*vs.*—

WILLIAM SCHEELE, Recorder of the Township of SADDLE RIVER, and the TOWNSHIP OF SADDLE RIVER, a municipal corporation of the State of New Jersey,

Appellees.

JAMES THOMPSON,

Appellant,

—*vs.*—

WILLIAM SCHEELE, Recorder of the Township of SADDLE RIVER, and the TOWNSHIP OF SADDLE RIVER, a municipal corporation of the State of New Jersey,

Appellees.

APPELLEES' BRIEF

ON APPEAL FROM THE NEW JERSEY COURT OF ERRORS AND APPEALS.

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Attorney for Appellees,
William Scheele, Recorder of the Township of Saddle River, and the Township of Saddle River, a municipal corporation of the State of New Jersey.

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IN THE

Supreme Court of the United States

No. 83, October Term, 1946.

INDEPENDENT WAREHOUSES, INC., PENNSYLVANIA COAL COMPANY and ERIE RAILROAD COMPANY,

Appellants,

—*vs.*—

WILLIAM SCHEELE, Recorder of the Township of SADDLE RIVER, and the TOWNSHIP OF SADDLE RIVER, a municipal corporation of the State of New Jersey,

Appellees.

JAMES THOMPSON,

Appellant,

—*vs.*—

WILLIAM SCHEELE, Recorder of the Township of SADDLE RIVER, and the TOWNSHIP OF SADDLE RIVER, a municipal corporation of the State of New Jersey,

Appellees.

APPELLEES' BRIEF

(1) Opinions Delivered in the Courts Below.

The opinions delivered in the Courts below are officially reported as follows:

New Jersey Supreme Court, *Independent Warehouses, Inc. et als. v. Scheele, et al.*, and *James Thompson v. same defendants*, 132 N. J. L. 390; New Jersey Court of Errors and Appeals, *Independent Warehouses, Inc., et als. v. Scheele et al.*, and *James Thompson v. same defendants-appellants*, 134 N. J. L. 133.

(2) Grounds of Jurisdiction.

The appellants claim that the judgment of the Court of Errors and Appeals of New Jersey in this matter (R. 265) is violative of the commerce clause of the United States Constitution and deprives them of due process and the equal protection of the laws.

(3) Statement of the Case.

Appellants' statement of the case is confusing and inaccurate due to their omission of certain of the material facts.

The appellants herein, Independent Warehouses, Inc. and James Thompson were convicted before the Recorder of the Township of Saddle River and fined $200.00 each (R. 6-9) on a complaint which charged the corporation with having conducted or carried on a business of the storage of personal property in a warehouse engaged in storing goods for hire without having obtained a license so to do for the place and premises in which said business was conducted in violation of Section 1 of an ordinance of the Township of Saddle River (R. 9). The complaint against the individual James Thompson charged him with having worked in, occupied, or utilized said place or premises. (R. 14).

Writs of certiorari were allowed by the Supreme Court of New Jersey for the review of the judgments of the Recorder's Court (R. 1). In that court the appellants assigned as reasons for the reversal of the judgments of conviction that the license fee imposed was unreasonable and that the ordinance placed an illegal burden upon interstate commerce (R. 15).

The Supreme Court of New Jersey permitted the Erie Railroad Co. and the Pennsylvania Coal Co. to intervene in the matter on the ground that the writ might affect their interests adversely (R. 20).

The state Supreme Court ordered the convictions reversed holding that the ordinance was unreasonable and that the goods stored in the warehouse were the subject of interstate commerce (R. 253-257).

On appeal to the Court of Errors and Appeals of New Jersey, which is the court of last resort in that state, the judgment of the New Jersey Supreme Court was reversed and the judgments of conviction affirmed (R. 275), that court holding that the license fee was not unreasonable and that there was a cessation of interstate commerce when the goods were placed in storage at the storage yard in question (R. 265-274).

It is not denied that Independent Warehouses, Inc. was operating the business of the storage of personal property in a warehouse for hire within the Township of Saddle River without a license so to do or that Thompson was employed by Independent Warehouses, Inc. (R. 7, 12, 14, 134, 151). The controversy between the parties is over the right of the municipality to impose, for the purpose of revenue, a license fee on the storage yards in question. In 1921, in *Pennsylvania Coal Co. v. Saddle River*, 96 N. J. L. 40, an attack was made on the taxation of the goods in storage at this yard on various grounds, including interstate commerce, and the New Jersey Supreme Court held that the coal in this yard was subject to taxation under the State Tax Act. Taxes were paid on the coal up to and including the year 1939 (R. 188). As to the 1940 tax assessment on the coal, in *Pattison & Bowns v. Saddle River Township*, 129 N. J. L. 135; 130 N. J. L. 177, it was held that coal stored in fenced in piles or in an otherwise open tract of land equipped to handle the same was within the purview of Section 54:4-3.20 of the Revised Statutes of New Jersey which exempted from taxation under the New Jersey Tax Act, personal property stored in a warehouse engaged in the business of the storage of personal property for hire.

Under the statutes of New Jersey, revenue for the support of the state, counties and municipalities is raised in several ways, but principally by direct taxation of property under the State Tax Act R. S. 54:4-1 *et seq.* and by the imposition of fees for revenue under various statutes providing for the same. The loss in revenue to the municipality as the result of the exemption from direct taxation afforded Independent Warehouses, Inc. under R. S. 54:4-3.20, amounted to approximately 8% of the total taxes collected by the Township for local, county, and state purposes. In order to make up this loss of revenue, the municipality thereupon, acting under the provision of R. S. 40:52-1 and 40:52-2 adopted an ordinance in the language of the statutes involved, to impose a fee of ¾ of a cent per each square foot of the ground area of the premises in or at which any commercial warehouse business was conducted (Ex. S-1, R. 9). This license fee meant a charge on the volume of business done at the yard in question of from $.0135 per ton (based on the municipality's computation of area (R. 204) and quantities (R. 68)) to $.0225 per ton (based on the appellants' estimate of area (Ex. P-2, R. 18) and capacity (*Independent Warehouses, Inc.* v. *Scheele*, 132 N. J. L. 390, 391; Ex. D-4, R. 250)); compared with taxation under the State Tax, if the appellants' place of business were a private warehouse, of from 29¢ to 58¢ per ton (R. 208).

Independent Warehouses, Inc., is a corporation of New York engaged in the general warehousing business (R. 134). For at least the previous 15 years it had issued warehouse receipts for coal stored at the yard in question (R. 153, 154, 155, 156 and 158). On June 20, 1939, it was given a lease of the yard for $1.00 per year (Ex. P-5, R. 24) and by a simultaneous agreement it agreed to operate the plant (Ex. P-6, R. 28) for a consideration which amounted to approxi-

mately $500.00 a year (R. 137). Operation under Exhibits P-5 and P-6 consisted of putting up a sign and having an auditor every couple of months check the warehouse receipts issued (R. 144, 145). Aside from the fact that the plant then carried the name Independent Warehouses, Inc., there was no other change in the method of operation (R. 154). Pennsylvania Coal Co., a corporation controlled by the Erie Railroad Co. (R. 93) has owned the yard since 1901 (R. 80) and since that time has either operated it itself or through various affiliated corporations (Ex. P-11).

The storage yards in question in this case are located not on Erie, but on the lines of the New York, Susquehanna and Western Railroad (Ex. P-9, R. 43; P-1, R. 18A) and presumably Erie intervenes, not as a common carrier, but rather because of its financial interest in Pennsylvania Coal Co.

Subsequent to the so-called lease to Independent Warehouses, Inc., Pennsylvania Coal Co. entered into an agreement with Erie whereby the Pennsylvania Coal Co. agreed to operate the yard for and on behalf of Erie for the stated purpose "so that shipments of coal may not be diverted to other and competing lines" (Ex. P-4, R. 20, 21). This agreement, however, made no change in the then existing system of operation except that it served as the means, through free storage, of furnishing a rebate out of Erie funds to the purchasers of coal of Pennsylvania Coal Company coal and similar grades. Despite the fact that Pennsylvania Coal Co. has already leased the plant to Independent Warehouses, Inc. for operation by the last mentioned company (Ex. P-5, p. 24), the agreement with Erie provided that Pennsylvania Coal Co. would continue its present operation of the storage yard (Par. 1, Ex. P-4, R. 20, 22). The yard was to be operated as to interstate shipments in accordance with the rules prescribed by the existing Interstate Commerce Commission Tariff and as to intra-state shipments by

the New Jersey Public Utility Tariff (Par. 2, R. 22). These tariffs had existed since 1906 (R. 123, Ex. P-11). An agent was to be maintained at the yard for the issuance of warehouse receipts (Par. 3, R. 22). This agent had been there for that purpose since at least 1929 (R. 153, 154, 157, 158). The remainder of the agreement obligated Erie to pay the cost of the operation of the yard. The rebate made to coal shippers by Erie under this arrangement amounted to $30,735.59 for the year 1943 (Ex. P-10, R. 49). The physical services performed at Coalberg (the name given to Independent Warehouses' Saddle River Township yard) had been substantially the same since 1903 (the decision in *Penna. Coal Co.* v. *Saddle River*, *supra*, dealt with conditions in 1919), the only change being in the company conducting the operations. The coal is shipped to the shipper with its destination "Coalberg" (Ex. P-12, R. 56). At that point the coal leaves the possession and control of the common carrier and is delivered into the custody of the warehouseman. The freight rate from the point of shipment to Coalberg is collected, plus an unloading charge (Ex. P-12) and two years' free storage is granted (Ex. P-12). Upon the orders of the owner of the coal, it may be reshipped by rail, by truck, or other means (Ex. P-12). If reshipped by rail, the freight rate charged is the balance of the through rate from the point of origin to the point of the new destination on reshipment plus the reloading charge (Ex. P-12). Coal taken from storage for local delivery is charged the local freight rate to Rochelle Park, N. J. (Ex. P-12). The yard does some local business (R. 163). The bulk of the business is with the Edgewater N. J. Coal yards (R. 163) with other of the coal being shipped to accounts in New Jersey, Maine, Massachusetts, and Long Island (R. 163).

The coal in storage is owned by the shipper (R. 136). It is kept in storage until it is ordered out by the owner (R. 137). It is deposited by the owners at appellant's yard to await orders from the owners for future delivery, for the purpose of future disposition and sale (R. 166), for the purpose of keeping a stock on hand to supply customers when the mines are closed (R. 96), or to accumulate a supply to meet demands which the mines are not competent to fill at normal rates of production (R. 96).

Reference is made in the opinion of the court below to the period of operation (R. 273), the corporate relationship between the appellants (R. 272) and the quantum of the tax upon the coal (R. 273). It should be pointed out that these findings of fact on the part of the court below were based in part on admissions of appellants contained in their own exhibits or pleadings but which were omitted by them as unnecessary in the printing of the record of this case (R. 289). Appellants have made no point as to the facts in the present case but for the purpose of clarity and a full understanding of the opinion below in this regard, the material allegations supporting these references are set up from the omitted exhibits as follows:

Exhibit P-11—Record below pages 71 and 72.

"Dec. 8, 1941

"3. Our investigation indicates that the physical services performed at Coalberg have been substantially the same since 1913 as prior thereto, the only change being in the company conducting the operations. The history of Coalberg's operation since 1913, showing the name of the company conducting the operation, the company from whom it was ostensibly performed, and the duration of each operation is outlined in the following table:

Company Operating Coalberg	Company for Whom Coalberg Was Operated	Duration of Operation
Pennslyvania Coal Company.	Self	March 1913—March 1925
Pattison & Bowns, Inc.	Penn. Coal Company	April 1925—Dec. 1929
Pattison & Bowns, Inc.	Pittston Company	Jan. 1930—Feb. 24, 1939
Erie Railroad Company	Self	Feb. 25—28, 1939
Pennslyvania Coal Company	Self	March 1, 1939 to present"

Exhibit P-11—Record Below pages 73 and 74.

"Pattison and Bowns is controlled by the U. S. Distributing Corporation, which, in turn, is controlled by the Pittston Company, Pittston itself is controlled by the Virginia Transportation Corporation, which is controlled by the Chesapeake and Ohio Railway. It also appears that the Pennsylvania Coal Company is controlled by the Erie Railroad Company, like the Chesapeake and Ohio a 'carrier-employer,' and this company is in turn controlled by the Virginia Transportation Corporation, which, as stated above, is controlled by the Chesapeake and Ohio."

Exhibit D-4—Petition to Intervene (Pennsylvania Coal Company), Record Below page 95.

"3. Petitioner is now, and has been for many years, the owner of land, aggregating 67.25 acres in Saddle River Township, Bergen County, New Jersey, upon 41.93 acres of which is located a coal storage plant, known in the railroad tariffs as 'Coalberg,' consisting of trackage layouts, trimmers, movable cranes and other specialized machinery for unloading storage and reloading coal at 12 piles, having an aggregate storage capacity of 400,000 tons."

Since all of appellants' exhibits referred to in this brief were offered together at page 62 of the record, reference to the offered page has been omitted.

ARGUMENT.

Summary of the Argument.

The appellants' attack on the convictions in this case is on two general grounds: 1. that the ordinance comprises a burden upon interstate commerce, and 2, that it deprives them of due process and the equal protection of the laws.

The appeal undertakes to obtain a modification of the rule followed by this court in numerous cases and adhered to in the New Jersey case of the *Susquehanna Coal Co.* v. *So. Amboy*, 228 U. S. 665 33 S. Ct. 512, 57 L. Ed. 1015, to the effect that there is a cessation of federal protection and a subjection to the dominion of the state when coal in movement in interstate commerce is brought to rest by the direction, and for the purposes of the owner thereof.

The appeal further raises the question as to whether there is a lack of due process or denial of the equal protection of the laws resulting from the substitution of license taxes in place of personal property taxes.

I.

The ordinance does not impose a burden upon Interstate commerce in violation of the commerce clause of the Constitution of the United States.

(Appellants' point relied on 1, R. 287).

Appellants' attack is on an ordinance of the Township which required a license for the place and premises in or at which the business of the storage of personal property in warehouses engaged in the business of storing goods for hire was conducted and carried on within the limits of the Township (Ex. S-1; R. 9, 7).

It was admitted that the appellant, Independent Warehouses, Inc. was operating a business at the time and place charged in the complaint in violation of the ordinance, if such ordinance was legal and valid (R. 7).

The situs of appellants' business was within the Township of Saddle River. In *Pennsylvania Coal Co.* v. *Township of Saddle River*, 96 N. J. L. 40, we find it described in 1921 as "a stored supply of anthracite coal physically situate in the Township." In *Pattison & Bowns, Inc.* v. *Township of Saddle River*, 129 N. J. L. 135, the business is described as follows: "Pattison & Bowns, Inc., together with a number of other coal companies, stored coal with Independent Warehouses, Inc. which was engaged in the business of storing goods for hire. In furtherance of the business it leased from Pennsylvania Coal Co. a tract of 56 acres upon which there were tracks, derricks, and other paraphernalia necessary to unload and load large stocks of anthracite coal. The coal is stored in piles 50 to 70 feet high, each pile surrounded by a wooden fence 6 to 8 ft. high". In *Independent Warehouses, Inc.* v. *Saddle River Township*, 52 Fed. Sup. 96, the business is referred to as follows: "The inter-

vening plaintiff, the Pennsylvania Coal Co. is the owner of 67.25 acres of land in the Township of Saddle River, Bergen County, New Jersey which it leased to the plaintiff Independent Warehouses, Inc. The latter company uses the property in question for the storage of coal mined without the State of New Jersey and intended for ultimate delivery within and without the State lines". In *Independent Warehouses, Inc.* v. *Scheele*, 132 N. J. L. 390, the New Jersey Supreme Court said: "It is the practice of the prosecutors to store large quantities of anthracite coal in their yard at Coalberg in the defendant municipality. This yard has a capacity of storing about 100,000 tons of coal". The Court below in *Independent Warehouses, Inc.* v. *Scheele*, 134 N. J. L. 134, after stating that the essential facts are not in dispute said: "The storage plant commonly known as 'Coalberg' is owned by the Pennsylvania Coal Co., a Pennsylvania corporation. It comprises 67¼ acres of land and buildings, tracks, chutes, hoppers, scales, machinery and equipment. The owner leased the yard in its entirety to Independent Warehouses, Inc., a New York corporation, at the nominal annual rental of $1.00".

There can be no question that the yard, physically, was subject to the dominion of the state. Therefore, the "drummer" line of cases relied on by the appellants in their brief are not applicable.

If we understand the appellants' argument correctly, it is their contention that because a railroad tariff may have been filed in respect to the charge for unloading and reloading the coal stored at the yard, and the loss in operation was, by agreement, underwritten by a common carrier, these things removed the yard from the dominion of the state and gave it protection under the interstate commerce clause.

In *Woodruff* v. *Parham*, 8 Wall. 123, a tax on the sale of merchandise, imposed alike whether of interstate origin or not, was declared not to fetter commerce among the states. In the *State Freight* Tax Case, *Reading Railroad Co.* v. *Pennsylvania*, 15 Wall. 232, the court held that a tax upon freight in movement from state to state is an improper regulation of commerce among the states. But in the Railway Gross Receipts Case, *Reading Railroad Co.* v. *Pennsylvania*, 15 Wall. 284, the rule was laid down that under the power of the state to tax, a tax on the gross receipts of a railroad doing an interstate business was not violative of the constitutional provision. Since then, there may have been an increase in the extent of the exercise by Congress of its power to impose police regulations on interstate commerce, thereby excluding state regulation (e.g. *Stafford* v. *Wallace*, 258 U. S. 495, cited by appellants), but there has been no diminution in the power of the state to tax. *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506. Any change in the interpretation of what is the line of demarcation between the power of Congress and the state's right to tax, so long established, would seemingly, at this date have to be by constitutional amendment.

If the yard of Independent Warehouses, Inc., in question in this case is without the dominion of the state, by the same token the place of business of every recipient of goods which ever moved in interstate commerce would equally be entitled to immunity from state taxation. In the case of *Louis K. Liggett* v. *Lee*, 288 U. S. 517; 53 Sup. Ct. Rep. 481, this Court said at page 486:

> "It is asserted that the act bears unevenly upon those who purchase directly from a wholesale house or manufacturer whose plant is outside the state, some of whom also store the goods in Florida preparatory to

retail sale, and those who purchase from a wholesaler within the state; that the former are engaged in interstate commerce, and the tax is as to them a burden upon that commerce. The claim merits no serious discussion. The tax is obviously laid for the privilege of operating stores in Florida, and attempts no discrimination between merchandise imported from another state and that produced in Florida. Compare *Emert* v. *Missouri*, 156 U. S. 296, 15 S. Ct. 367, 39 L. Ed. 430; *Armour & Co. v. Virginia*, 246 U. S. 1, 38 S. Ct. 267, 62 L. Ed. 547; *Sonneborn Bros. v. Cureton*, 262 U. S. 506, 43 S. Ct. 643, 67 L. Ed. 1095. It levies no tax and lays no burden on the purchase in interstate commerce of articles for sale in Florida. *Kehrer v. Stewart*, 197 U. S. 60, 65, 25 S. Ct. 403, 49 L. Ed. 663; *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 471, 51 S. Ct. 499, 75 L. Ed. 1171. The tax on the value of merchandise in a retail store, or warehoused in Florida for sale in that store, even though incident on articles which have moved in interstate commerce, is laid after interstate commerce has ceased. Compare *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 S. Ct. 365, 48 L. Ed. 538; *Bacon v. Illinois*, 227 U. S. 504, 33 S. Ct. 299, 57 L. Ed. 615; *Texas Co. v. Brown*, 258 U. S. 466, 475, 42 S. Ct. 375, 66 L. Ed. 721; *Gregg Dyeing Co. v. Query*, 286 U. S. 472, 478, 52 S. Ct. 631, 76 L. Ed. 1232.

Furthermore appellants cannot rely on the fact that the ordinance may result in a tax on the common carrier, Erie, for the reason that this court has said it is unlawful for the common carrier to assume the loss on in-transit warehousing. The Appellants' own evidence discloses that the coal shipped was charged the regular freight rate with an unloading charge but was furnished free storage (P. 12, R. 56)—the

deficit in the cost of such storage being paid by the railroad company. (Ex. P-4, R. 22). This is plainly a rebate to coal shippers, held illegal by this court in *Baltimore & Ohio Railroad Co.* v. *U. S.*, 305 U. S. 507, 59 S. Ct. Rep. 284 where the court said at page 291:

> "If the service is non-transportation, the fact that it is in a tariff does not save it from the condemnation of Section 6 (7). That section forbids receiving a less compensation for transportation than the tariff. The loss on in-transit warehousing, entered into to secure the rail-haul, results in lowered receipts for the transportation and in violation of the section. Some shippers are not in a position to avail themselves of the below cost in-transit service. They must pay the full transportation rate, without any offset from the warehousing. This discrimination between shippers is unlawful."

It cannot be said that, if the cost of the license were passed along to the owner of the goods in storage, there would result any improper burden. In such case, the owner would be in no different position than if, instead of shipping his goods into the warehouse of Independent Warehouses, Inc., he shipped them into his own warehouse when they certainly would be subject to the dominion of and taxation by the state. Even if we say the license fee is a tax on the owners of the coal rather than a tax on the operator of the warehouse, still it would not be an improper burden. In *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 60 S. Ct. Rep. 388, this Court said at page 392:

> "But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their

just share of state tax burdens merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business * * * a tax may be levied on net income wholly derived from interstate commerce. Non-discriminatory taxation of the instrumentalities of interstate commerce is not prohibited. The like taxation of property, shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation. An excise for the warehousing of merchandise preparatory to its interstate shipment or upon its use, or withdrawal for use, by the consignee after the interstate journey has ended is not precluded. Nor is taxation of a local business or occupation which is separate and distinct from the transportation or intercourse which is interstate commerce, forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by such business, or is prerequisite to it. *Western Live Stock v. Bureau of Revenue*, 303 U. S. p. 253, 58 S. Ct., page 547, 82 L. Ed. 823, 115 A. L. R. 944, and cases cited."

And in speaking of a New York City Sales Tax imposed on coal, this court said in the foregoing case at pages 393, 394:

"It does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in in-

terstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax on the 'use' of property which has just been moved in interstate commerce sustained in *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, 54 S. Ct. 575, 78 L. Ed. 1141; *Henneford* v. *Silas Mason Co.*, *supra*; *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62, 59 S. Ct. 376, 83 L. Ed. 488; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 59 S. Ct. 389, 83 L. Ed. 586, or the tax on storage or withdrawal for use by the consignee of gasoline, similarly sustained in *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 52 S. Ct. 631, 76 L. Ed. 1232, 84 A. L. R. 831; *Nashville, C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730, 87 A. L. R. 1191; *Edelman* v. *Boeing Air Transport Co.*, 289 U. S. 249, 53 S. Ct. 591, 77 L. Ed. 1155, or the familiar property tax on goods by the state of destination at the conclusion of their interstate journey. *Brown* v. *Houston*, *supra*; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 24 S. Ct. 365, 48 L. Ed. 538."

There are no facts in the present case which distinguish it from the decision of this court in *Susquehanna Coal Co.* v. *So. Amboy*, 228 U. S. 665. That case was an appeal from the New Jersey courts wherein, in *Susquehanna Coal Co.* v. *So. Amboy*, 76 N. J. L. 412, the New Jersey Supreme Court stated the facts as follows:

"All that they have succeeded in showing is that their eastern agents have certain customers who, as a matter of experience, call for a certain amount of coal per week or month or year, and that in anticipation of orders for the delivery of this coal and for the purpose of being ready to fill orders as soon as received,

the coal is put in transit before the orders are actually placed. It was not consigned from the mine to any definite customers in New York or New England. On the contrary it appears to have been consigned by the Susquehanna Coal Company, in Pennsylvania, to the Susquehanna Coal Company, in South Amboy, in anticipation, as we have said, of orders from regular customers, and awaiting such orders indefinitely."

That case was carried to this court, as stated by the court, "on the ground that the coal was in transit from points in the state of Pennsylvania through the state of New Jersey to destinations outside of the latter state and being, as it is alleged, in interstate commerce, the taxes on which were levied in contravention of the commerce clause" 228 U. S. 665, 666.

The undisputed proof in the present case coming from the appellants' own witness is identical with the facts in the Susquehanna Coal Co. case and is as follows:

"Q. Does the Pennsylvania Coal Company own a storage plant in Saddle River Township? A. Yes (R. 80).

"Q. For what purpose was it acquired? A. It was purchased to provide a location convenient to tidewater markets for the storage of excess production of coal during certain seasons of the year, in readiness for deliveries during the winter months when the demand normally exceeds production, and for emergencies caused by mining or transportation interruptions, bad weather or other conditions (R. 80, 81).

"Q. What is the reason for that storage? Why is it stored there? Why do they store it there? A. Well, you answered it when you put the question yourself; because of the seasonal conditions the supply exceeds

the demand, and, therefore, the operators bill it to storage, to store it at an advantageous point for reshipment. It also relieves the car situation. It also helps the operator to continue operating (R. 120).

"Q. The reason for that is because the shipper at that time is not able to determine the final destination of the coal? A. I wouldn't put it just that way. I would say that the shipper hasn't enough orders to ship it out direct to destination (R. 120).

"Q. In other words, it (the coal) comes in and it is held there awaiting orders from the consignee as to what is to happen to it. Is that right? A. That is right (R. 119).

"Q. And it may remain there for a period of two years? A. That is right (R. 119).

"Q. All this coal comes in consigned to Coalberg, is that correct; I mean the destination? A. It is consigned to Coalberg, Rochelle Park, for storage. (R. p. 166)

"Q. What destination? A. Rochelle Park, Coalberg, New Jersey, for storage; billed at the regular tariff rates from the mine to the storage plant (R. 118).

"Q. Another shipper might put in 100,000 tons in the early spring and sell 100,000 tons before the next shipment, and another shipper might put in 50,000 or 100,000 tons in the late summer and sell 75,000 tons in that month, which would leave 25,000 tons over for the following season. It is an overlapping storage. A. Yes (R. 166).

"Q. But, if the shipper's busines was bad, he might ship in 50,000 tons, and it might lay there for a year and a half, isn't that right? A. If his business was bad? Not today (R. 167).

"Q. Depending upon what the condition might be in the trade? A. Yes (R. 167).

"Q. You previously testified to a portion of this coal being sold in the neighborhood. A. The bulk of the business was with the Edgewater Coal Docks (R. 162, 163).

"Q. Don't you load coal for points in New Jersey? A. Oh, yes, we have some accounts in New Jersey. We have had them in Maine, and Massachusetts, Long Island" (R. 163).

This court in *Susquehanna Coal Co. v. South Amboy*, 228 U. S. 665, had the following to say at page 669:

"It is clear, we repeat, that such trade could only be accommodated through the storage of coal somewhere, and plaintiff in error availed itself of the conditions to put the storage in New Jersey.

"The coal, therefore, was not in actual movement through the State; it was at rest in the State, and was to be handled and distributed from there. Therefore, the principles expressed in *General Oil Co. v. Crain*, 209 U. S. 211, and *Bacon v. Illinois*, 227 U. S. 504, are applicable to it. The products in neither of those cases were destined for sale in the States where stored; the delay there was to be temporary, a postponement of their transportation to their destinations. There was, however, a business purpose and advantage in the delay which was availed of, and while it was availed of, the products secured the protection of the State. In both cases it was held that there was a cessation of interstate commerce and subjection to the dominion of the State.

"In *Bacon v. Illinois*, the grain which was taxed had been shipped by the original owners, who were residents

of southern and western States, under contracts for its transportation to New York and Philadelphia and other eastern cities, with a reservation to the owners to remove it from the cars at Chicago for certain temporary purposes 'or change the ownership, consignee or destination thereof.' The grain, while in transit, was purchased by Bacon, he succeeding to the rights of the vendors. Upon arrival of the grain at Chicago he exercised the right to remove it from the cars to his private elevator to avail himself of the privilege reserved. The privilege being exercised, he turned the grain over to the railroad companies for transportation in accordance with original contracts. After commenting upon the power he had over the grain while in Chicago, we said (p. 516), 'He had established a local facility in Chicago for his own benefit and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the State in an assessment for taxation which was made in the usual way without discrimination.' For this conclusion cases were cited. It was further said (p. 517), 'The property was held within the State for purposes deemed by the owner to be beneficial. * * *.'

"In *General Oil Co. v. Crain*, oil contained in tanks at Memphis, Tennessee, was subject to an inspection tax. The oil was shipped to Memphis from producing and refining points in Ohio and Pennsylvania and handled in tank cars and other receptacles to be forwarded to customers in Arkansas, Louisiana and Mississippi, in which States the Oil company had many regular customers from whom it always had on hand many unfilled orders for oil to be delivered as soon as possible or convenient. At Memphis the Oil company main-

tained two tanks, one of which was plainly marked: 'Oil already sold in Arkansas, Louisiana and Mississippi,' and which remained in Memphis only long enough (a few days) to be properly distributed according to the orders therefor. The other tank or vessel was for oil sold in those States and kept separate and apart until orders should be received from customers in those States. The oil was never sold otherwise than upon such orders. We said of this situation that the company was doing business in the State and that its property was receiving the protection of the State. Its oil was not in movement through the State. To the contention that the oil was only there for distribution and to fulfill orders already received, we said (p. 231), 'It required storage there—the maintenance of the means of storage of putting it in and taking it from storage.'"

There is also no distinction between an assessment under a tax act and a license fee. The case of *Federal Compressed Warehouse Co.* v. *McLean*, 291 U. S. 17, 54 Sup. Ct. Rep. 267, is identical with the present case. A tax on each person operating a warehouse which was graduated according to the storage capacity of the warehouse was assailed as infringing the commerce clause. The court recites the facts as follows:

"The purchases are made for resale or to fulfill contracts for sale of cotton without the state. In the usual course of business the purchased cotton, after it is ginned, is transported to appellant's warehouse for storage and compression, about 25 per cent. arriving by automobile truck or wagon and the remainder by rail over the line of the single railroad serving Cleveland. Upon delivery Appellant issues its negotiable

warehouse receipts for the cotton, in the form and manner provided by the United States Warehouse Act. The right to demand delivery of the cotton or otherwise control its disposition is reserved to the holders of the receipts. A small part of the stored cotton, from 1 per cent. to 10 per cent. is resold within the state to buyers who sell it to purchasers without the State, but all except a negligible part of it is ultimately shipped to points outside the state. Upon shipping orders given by the holders of the warehouse receipts, appellant compresses the cotton into bales of standard weight and size, suitable for shipment, and delivers them to the rail carrier for interstate transportation. The movement of the cotton out of the warehouse is directed by the owners of it who hold the warehouse receipts. Its destination is not determined until the owner gives shipping instructions to appellant, and shipment is not made until surrender of the warehouse receipts. The compress charges are paid by the carrier, which it adds to the charge for carriage, and, in the case of cotton brought to the warehouse by rail carriage, the through interstate rail rate is applied from the point of origin to destination instead of the combination rate which is the sum of the intrastate rate to Cleveland and the interstate rate from that point to destination. The identity of the cotton is not preserved in re-shipping it, and substitution is permitted with the understanding that the through rate from point of origin to destination without the state shall not be affected."

The Court held as follows at page 268:

"It is clear that by all accepted tests the cotton, while in appellant's warehouse, has not begun to move in interstate commerce, and hence is not a subject of inter-

state commence immune from local taxation. When it comes to rest there, its intrastate journey, whether by truck or by rail, comes to an end, and, although in the ordinary course of business the cotton would ultimately reach points outside the state, its journey interstate does not begin, and it does not become exempt from local tax until its shipment to points of destination outside the state. Before shipping orders are given, it has no ascertainable destination without the state, and in the meantime, until surrender of the warehouse receipts, it is subject to the exclusive control of the owner. Property thus withdrawn from transportation, whether intrastate or interstate, until restored to a transportation movement interstate, has often been held to be subject to local taxation. (Citing cases.)

"A nondiscriminatory tax upon the business of storing and compressing the cotton, which is not itself the subject of a movement in interstate commerce, is not forbidden."

The requirement that a license must be obtained does not violate the Federal Constitution. In the case of *Cargill v. Minnesota*, 180 U. S. 452, the statute provided that it should be unlawful to receive, store, ship or handle any grain in any elevator or warehouse unless the owner shall have procured a license therefor from the State Railroad and Warehouse Commission. The complaint alleged that "the elevator was essential and necessary to the Railroad Company in order to promptly, safely and properly handle grains received by it for shipment; and constituted, in that respect, a necessary adjunct to the railroad." The Court had the following to say at page 470:

"It is also contended that the requirement of a license from the defendant company is inconsistent with the power of Congress to regulate commerce among the States. This view cannot be accepted. The statute puts no obstacle in the way of the purchase by the defendant company of grain in the State or the shipment out of the State of such grain as it purchased. The license has reference only to the business of the defendant at its elevator and warehouse. The statute only requires a license in respect of business conducted at an established warehouse in the State, between the defendant and the sellers of the grain. We do not perceive that in so doing the State has entrenched upon the domain of Federal authority, or regulated or sought to regulate interstate commerce. In no real or substantial sense is such commerce obstructed by the requirement of a license."

It is to be noted that there was previous litigation between the same parties in reference to the exemption from personal property taxes on the coal in storage, *Independant Warehouses, Inc. v. Township of Saddle River*, 129 N. J. L. 137, 130 N. J. L. 217. If the coal in this case were in interstate commerce, that, in itself, would have been sufficient to obtain the tax exemption sought in that litigation. However, the question was not raised—undoubtedly because of the decision in *Pennsylvania Coal Co.* (one of the appellants here) v. *Township of Saddle River*, 96 N. J. L. 40 in which case the court said:

"The question is as to the liability to taxation on October 1st, 1919, of a stored supply of anthracite coal, at that date physically situate in the Township above named. Apart from the effect, if any, of a technical state of war, and the attendant war legislation of the

United States, executive orders of the President and other national officials, and conditions incident thereto, there is no doubt that the status of this property as to taxability is indistinguishable from that dealt with in such cases as Lehigh and Wilkes Barre Coal Co. v. Junction, 75 N. J. L. 68, 922; Susquehanna Coal Co. v. South Amboy, 76 Id. 412; affirmed in 77 Id. 796, and Same v. Same, 228 U. S. 665; 57 L. Ed. 1015; no interstate commerce feature being involved."

The appellants' own proof in this case established beyond the question of a doubt that the physical facts existing at the yard are the same as those which existed prior to the lease to Independent Warehouses, Inc.

The manager in charge of the Coalberg plant testified as follows (R. p. 153):

"Q. You have been employed by the Independent Warehouses, Inc. for a number of years, haven't you? A. Yes sir.

Q. How many years was that? A. Going on 15 that I have been at the plant.

Q. And during that time you were employed by the Independent Warehouses, Inc? A. That is right.

Q. In the same capacity as you are now employed? A. Yes sir."

And at page 154:

"Q. And about these agreements back and forth between Penns Ivania Coal Co. and Independent Warehouses Inc., you know nothing about them? They did not go through your hands at all? A. No, I did not know anything about them.

Q. The present method is the same as the old method as far as your duties go? A. Yes, in so far as my duties are concerned."

The coal agent of the intervenor Erie testified as follows (R. 118, 119).

"Q. Tell us how the coal comes from the mine to Saddle River Township. A. It is billed by the shipper on waybills and shipped to the name of the consignee.

Q. What destination? A. Rochelle Park, Coalberg, New Jersey, for storage, billed at the regular tariff rates from mine to storage plant.

Q. How was it billed before 1939? A. The same way."

In an effort to get away from the decision in *Pennsylvania Coal Co. v. Saddle River Township*, the Erie offered in evidence Exhibit P-4 (R. 20) which is an agreement dated July 10th, 1939, made between the Pennsylvania Coal Company and the Trustees of the Erie. This agreement provided that Pennsylvania Coal Co. would continue to operate the Coalberg storage yard for the benefit of Erie (R. 22) and that the net loss of operation, would be paid by Erie (R. 22), such deficit amounting to $7,639.32 for the year 1941, $18,377.38 for the year 1942, and $30,735.59 for the year 1943 (Ex. P-10 R. 49). Since there was no change in the physical services performed at Coalberg, it must necessarily be the appellants' contention that this financial arrangement took the coal, which had not heretofore been in interstate commerce and put it into that category. Obviously because a railroad company, engaged in interstate commerce, may be instrumental in rendering some services, that, in itself, would not create the status of interstate commerce so as to give immunity from taxation unless the same would also be true of other than a railroad company. The

status of interstate commerce, as defined in *Susquehanna Coal Co.* v. *South Amboy, supra*, is dependent upon physical facts and such status cannot be obtained simply as the result of a financial arrangement between the parties or by a tariff which is merely the published agreement between the railroad and shipper. In the case of *Federal Compress & Warehouse Co.* v. *McLean*, 291 U. S. 17, 54 S. Ct. Rep. 267, 269 the Court said:

> "The fact that appellant's contract with the interstate rail carrier has designated appellant as the carrier's agent and appellant's warehouse as the carrier's depot cannot alter the legal consequences of what is actually done with the cotton by its owners or of their power of control over it, or of the actual course of dealing with it by appellant. It is not within the power of the parties, by the descriptive terms of their contract, to convert a local business into an interstate commerce business protected by the interstate commerce clause".

Factually, the coal, when it came to rest at the yard in Saddle River Township had ceased to be in interstate commerce. It goes without saying that since the coal stored at this yard is not in interstate commerce, the business or place of storage is also not in interstate commerce.

The owners of the coal voluntarily selected Saddle River Township as the point for bringing the coal to rest. They were dealers of coal in quantities of from 50,000 to 100,000 tons (R. 166). To store coal in that quantity at their own places of business in New York City or in any city would require invaluable space which would be highly difficult to obtain. It would necessitate valuable side-trackage and unloading equipment. Operators would be confronted with zoning, building, and fire regulations. On a sale in New York City they would be subject to a municipal sales tax.

McGoldrick v. *Berwind-White Coal Mining Co.*, *supra*, and in many jurisdictions personal property taxes and state income taxes. But all this was avoided by storing in Saddle River Township. The yard had an area of 56 acres and a capacity of 100,000 tons with side-trackage and the necessary loading and unloading machinery and the storage was free. Since the use existed prior to the adoption of zoning in the Township, as long as the same business continued, it would, as a non-conforming use, not be affected thereby. R. S. 40:55-48. By virtue of being stored in a commercial warehouse, the coal was exempt from personal property taxes. *Independent Warehouses, Inc.* v. *Saddle River Township*, *supra*. The State of New Jersey has no sales tax or income tax. The advantages of bringing the coal to rest in Saddle River Township, rather than at the main office of the owner thereof wherever the same might be situate, were manifestly plain. Saddle River was voluntarily selected for its storage because of the valuable benefits obtained therefrom. In so doing the business of such storage was subject to the dominion of the government of the Township for the purpose of taxation.

The case of *Lehigh and Wilkes Barre Coal Co.* v. *Borough of Junction*, 75 N. J. L. 922, was followed by the court below (R. 272). In that case the facts were identical with those in the present case and there are reviewed many of the decisions of this court on the question raised in this case. The substance of those decisions is that if the owner of property in transit from one state to another, of his own volition or for his own purposes, causes the discontinuance of the actual transportation of such property and brings the same to rest within a state, it ceases to be in interstate commerce irrespective of what the ultimate purpose may be. This brings the present case squarely within the language of *J. Bacon & Sons* v. *Martin*, 305 U. S. 380, 59 S. Ct. Rep. 257, 259 wherein the Court said:

"The construction of the statute by the state court is binding upon us (citing cases). And in the light of its construction the state court applied the principles declared in our decisions" (citing cases).

State License Fees.

Under this subhead the appellants argue that the Railroad Tax Act (N. J. P. L. 1941, Chapter 291, p. 776, as amended) provided that a tax assessed pursuant to that Act should be in lieu of all other state or local taxation. This was not assigned as a reason by the appellants in the state court (R. 15).

Reference is also made to Chapter 162, N. J. P. L. of 1945, p. 563 which provides that a corporate franchise tax "shall be in lieu of all other state, county, or local taxation upon or measured by intangible personal property" but this statute was not in effect when the convictions were had in the present case.

The Court below considered the question and said:

"Obviously, the franchise grant to the railroad company does not render immune from regulation and taxation under Section 40:52-1 (g) and 40:52-2, supra, a public warehouse business conducted by another, even though the operator be one of its corporate subsidiaries. The question is essentially one of legislative intention; and there is no indication whatever of a purpose to exempt a public warehouse of this category from the operation of the cited statute, simply because the railroad company uses the facility for what it terms in-transit storage after the movement in commerce has come to an end."

Under the rule in *J. Bacon & Sons v. Hartia*, supra, the lower court's construction disposes of the question.

II.

The ordinance does not deny the appellants due process or the equal protection of the laws.

(Appellants' point relied on 3, R. 288).

The appellants also attack the convictions on the ground that the license fee prescribed in the ordinance under which the same were had, denied them of due process and the equal protection of the laws.

The same attack was made on the convictions in the Court below and that Court had the following to say in reference thereto (R. 273):

> "A tax on a public warehouse graduated according to storage capacity is familiar legislative practice. Vide Federal Compress and W. Co. v. McLean, supra. The license has reference only to the public warehouse business transacted at the warehouseman's established place of business within the state. W. W. Cargill Co. v. Minnesota, 180 U. S. 452; 21 S. Ct. 423, 45 L. Ed. 619. And under the ordinance in the case at hand, the warehouse corporation may protect itself against the inclusion of areas not devoted to storage in the calculation of the tax. There is a presumption that the tax is reasonable in amount; and the burden rests upon the challenger to overthrow that presumption. It has not been sustained here. There is not such disparity between the 'value of the privilege' and the levy as would render the ordinance arbitrary and discriminatory. The parties are in disagreement as to the quantum of the tax upon the stored coal per ton. Based upon respondent's estimate of total plant area and capacity, the tax per ton would amount to 2½ cents, while the

personal property tax would range between 29 cents and 58 cents per ton. From 1903 to 1940, when tax exemption was claimed under section 54:4-3.20, the plant was successfully managed notwithstanding that property taxes were paid on the stored coal in an amount not less than the current license tax."

The ordinance in question is expressly authorized by statutes of the State of New Jersey and it is to be noted that the appellants' attack is not against the statutes. The pertinent authorizing statutory provisions are as follows:

"R. S. 40:52-1. The governing body may make, amend, repeal and enforce ordinances to license and regulate:

"g. Lumber and coal yards, stores for the sale of meats, groceries and provisions, dry goods, merchandise and goods and chattels of every kind, and all other kinds of business conducted in the municipality other than herein mentioned, and the places and premises in or at which the business is conducted and carried on."

"R. S. 40:52-2. The governing body may fix the fees for all such licenses, which may be imposed for revenue, and may prohibit all unlicensed persons and places and vehicles, businesses and occupations from acting, being used, conducted or carried on; impose penalties for violation of ordinances providing for licenses, and revoke any license for sufficient cause and after notice and hearing."

"R. S. 40:49-5. The governing body may prescribe penalties for the violation of ordinances it may have authority to pass, either by imprisonment in the county

jail or in any place provided by the municipality for the detention of prisoners, for any term not exceeding ninety days, or by a fine not exceeding two hundred dollars, or both. The magistrate before whom any person is convicted of violating any ordinance of a municipality, shall have power to impose any fine or term of imprisonment not exceeding the maximum fixed in such ordinance.

"Any person convicted of the violation of any ordinance may, in the discretion of the magistrate by whom he was convicted, and in default of the payment of any fine imposed therefor, be imprisoned in the county jail or place of detention provided by the municipality, for any term not exceeding ninety days.

"There may issue out of the court of any magistrate empowered to impose fines for the violation of any municipal ordinance, execution against the goods and chattels of any person convicted in said court or before said magistrate. Execution shall be levied and enforced in the same manner as are executions from the small cause court."

Sections 1, 2, 3 and 7 of the ordinance (Ex. S-1, R. p. 9) brought in issue by the convictions under review in this case, follow substantially verbatim the words of the above statutes. The public policy underlying the passage of an ordinance under these statutory provisions is in New Jersey a matter to be determined by the municipal governing body. *Thorne* v. *Kearny*, 100 N. J. L. 228. This rule is also adhered to by this court. In the case of *State Board of Tax Commissioners of Indiana* v. *Jackson*, 283 U. S. 527; 51 S. Ct. Rep. 510, 543, the Court said:

"It is not the function of this Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives, or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the Legislature if there are substantial differences between occupations separately classified. Such differences need not be great. The past decisions of the Court make this abundantly clear."

The Classification.

The class of business provided to be licensed by the ordinance is a classification established by the tax laws of New Jersey as follows: R. S. 54:4-3.20 "All personal property stored in the warehouse of any person, co-partnership, or corporation engaged in the business of storing goods for hire shall be exempt from taxation under this chapter."

The Court of Errors and Appeals of New Jersey, which is the highest court of that state, affirmed the New Jersey Supreme Court in *Schwartz* v. *Essex County Board of Taxation*, 129 N. J. L. 129, 130 N. J. L. 177 wherein a taxpayer made the same charge against the classification as is made by the appellants in this case. The Court said:

"There no longer exists any doubt but that the legislature is competent to classify objects of legislation and this includes classification for the purpose of taxation and exemption from taxation. * * * We are of the opinion that the statute under attack meets these tests."

This rule was also followed in *Independent Warehouses, Inc.* v. *Township of Saddle River*, 129 N. J. L. 137, 130 N. J. L. 217, *Pattison & Bowens* v. *Township of Saddle River*, 129 N. J. L. 135, 130 N. J. L. 177.

By R. S. 54:4-3.20, goods stored in a commercial warehouse were selected by the legislature of New Jersey as the proper subject for tax exemption under the tax laws of that state on the ground that it was not entirely practical to correctly levy separate and individual assessments on the varied and often-times transient owners of such goods and that therefore, in some instances, because of the resulting confusion in such assessments, the enforcement of the provisions of the Tax Act in respect thereto brought about hardship and injustice. However, R. S. 54:4-3.20 was never intended by the legislature of New Jersey to grant to the owners of goods stored in public warehouses absolute immunity from paying their share of the burdens of government. The original act, Chapter 221 N. J. P. L. 1925 specifically limited the exemption to "taxation under this Act", the statute being an amendment of "An Act for the assessment and collection of taxes (Revision of 1918)". This limitation was carried forward into the Revised Statutes of New Jersey of 1937 by the use in R. S. 54:4-3.20 of the words "shall be exempt from taxation under this chapter".

Unless we are to presume the legislature of New Jersey was not fully cognizant of its own actions, we must deem that they considered the result of making the tax-exemption statute part of the legislative scheme of the state and that they reached the conclusion that the public interest would be best served and fully protected by license fees for revenue imposed under the provisions of R. S. 40:52-2 above mentioned, which was then Section 2 of Article 15 of Chapter 152 N. J. P. L. 1917, and R. S. 40:52-1 (a), which was then Chapter 252 N. J. P. L. 1918. The legislature of New Jersey could have granted commercial warehouses a tax exemption without limitation but, having failed to do so and having specifically qualified the exemption to "taxation under the Tax Act" it necessarily follows that the state's lawmaking

body intended to leave to the municipalities the power to tax under other existing statutes. Consequently the adoption of an ordinance under the reserved power could not, in itself, be construed to be arbitrary or capricious so as to deprive a party affected thereby of his constitutional rights.

And likewise it cannot be said that the classification in the ordinance in the present case discriminates. Logic dictates that a classification good when used in a statute, would not be bad when used in an ordinance under the same circumstances. The ordinance applied the license fee verbatim to the same classification ("warehouses engaged in the business of storing goods for hire") as was used by the legislature of New Jersey in granting the tax exemption. The language of both the ordinance and the statute is equally embracive. The facts and circumstances which warranted the legislature in legislating in respect to the taxation of commercial warehouses were, to the same extent, true when the municipality gave consideration to the same subject.

On the general question of classification, this Court said in the case of *State Board of Tax Commissioners of Indiana v. Jackson*, 283 U. S. 527, 51 S. Ct. Rep. 540, 543, *supra*, as follows:

> "The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. Bell's Gap R. R. v. Penn., 134 U. S. 232, 10 S. Ct. 533, 33 L. Ed. 892; Southwestern Oil Co. v. Texas, 217 U. S. 114, 30 S. Ct. 496, 54 L. Ed. 688; Brown-Forman Co. v.

Kentucky, 217 U. S. 563, 30 S. Ct. 578, 54 L. Ed. 883. The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 21 S. Ct. 43, 45 L. Ed. 102, or if any state of facts reasonably can be conceived to sustain it. Rast v. Van Deman, 240 U. S. 342, 36 S. Ct. 370, 374, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 155; Quong Wing v. Kirkendall, 223 U. S. 59, 32 S. Ct. 192, 56 L. Ed. 350. As was said in Brown-Forman Co. v. Kentucky, supra, at page 573 of 217 U. S. 30 S. Ct. 578, 580:

> 'A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.'"

"The ordinance in question in this case differentiated between private warehouses and commercial warehouses. A commercial warehouse is a business in itself, while a private warehouse, at its best, is merely incidental to a business. The differences between the two are too obvious to require argument. On the question of the classification of warehouses, this Court, in *Louis K. Liggett Co. v. Lee*, 288 U. S. 517, 53 S. Ct. Rep. 481, 485 *supra*, had the following to say:

> "Section 5, in addition to the graduated license fee, lays a tax of $3.00 on each $1,000 value of stock carried in each store, or for sale in such store, and section 2 in

cludes within the goods, wares, and merchandise from which sales are to be made those owned by the taxpayer and held in storage to be sold in or through such store. The appellants insist that this requirement deprives them of the equal protection of the law for the reason that wholesale merchants not taxed by the act in question are assessed under section 926 of the Revised General Statutes of Florida (Comp. Gen. Laws Fla. 1927, 1127) a tax of only $1.50 per $1,000 of value on stock carried in their stores or warehouses. The result is said to be that a chain store operator must pay double the amount paid by the wholesaler who supplies individual stores competing with the chain.

"Chain stores do not sell at wholesale. What they store, if they warehouse any goods in the state of Florida is for the purpose of retail sale at their shops. On the other hand, goods held by a wholesaler are stored for sale to retail establishments to be resold by the latter. What has been said with respect to difference in methods and operation of the two kinds of warehouses applies in this instance. The diverse purposes of the storage and the difference in the nature of the business conducted are sufficient to justify a different classification of the two sorts of warehouses for taxation."

In the case of *Cargill* v. *Minnesota*, 180 U. S. 452, *supra*, this Court said at page 469:

"If in the judgment of the State it was necessary for the public interests, or beneficial to the public, that elevators and warehouses of the kinds described should be operated only under a license and under such regulations as may be rightfully prescribed, it would be going very far to hold that such a classification was so un

reasonable as to justify us in adjudging that the requirement of a license was void as denying the equal protection of the laws. No such judgment could be properly rendered unless the classification was merely arbitrary or was devoid of those elements that are inherent in the distinction implied in classification. We cannot perceive that the requirement of a license is not based upon some reasonable ground—some difference that bears a proper relation to the classification made by the statute. Gulf, Col. & Santa Fe Ry. v. Ellis, 165 U. S. 150, 165."

It is difficult to ascertain from the record or from appellants' brief what specific complaint they have with the classification contained in the ordinance in this case, but, since this court is not concerned with the propriety or justness of the tax or the motives or public policy underlying the same, we discuss the subject of classification because it would appear to be appellants' only proper basis of attack under this point. In New Jersey, under the General Tax Act; all personal property is subject to taxation for the support of the municipal, school, county, and state governments at a rate fixed by the municipality in accordance with the mechanics of the statute (R. S. 54:4-1, *et seq.*). This, of course, also includes personal property stored in private warehouses, but, as before mentioned, by R. S. 54:4-3.20, such property stored in commercial warehouses is exempt from this taxation.

Appellants charge that the ordinance in question is an intentional attempt to secure revenue lost by inability to impose personal taxes on the coal. At page 14] of their brief they say that the annual license fee would be $12,545.97. As found by the Court below, from the year 1903 until 1940, during which period of time the storage yard was success-

fully operated as a private warehouse, personal property taxes were paid on the coal in storage under the Tax Law of New Jersey in an amount of approximately $12,000 per year (R. 273, 188). In 1940, Independent Warehouses, Inc., for the first time, claimed and obtained an exemption from personal property taxes under R. S. 54:4-3.20, *Independent Warehouses, Inc.* v. *Saddle River Township*, 129 N. J. L. 137. This tax exemption brought about approximately an 8% diminution of the tax receipts of the municipality (R. 191). As the result thereof, there arose the necessity to bring into operation the state's constitutional power to tax, and thereby the problem was rendered free of any question of an attempt to regulate interstate commerce. Furthermore, this fact, in itself, constituted sufficient basis for classification. In a well-considered opinion, based largely on decisions of this Court, and with able counsel participating, in *Knoxville & Ohio R. Co.* v. *Harris*, 99 Tenn., 684, 53 L. R. A. 921 (Writ of Error dismissed by U. S. Supreme Court February 1st, 1900), the Tennessee Supreme Court dealt with a situation similar to the present case. Therein the Court disposes of any arguments which might be raised by the appellants in this case, in words clearer and fewer than we could hope to use, saying:

> "Exemption from ad valorem taxation no more includes exemption from privilege taxation than the imposition of an ad valorem tax includes the imposition of a privilege tax. If one imposition does not embrace both, one exemption does not embrace both. No more is it an answer to this interpretation to say that it leaves the immunity allowed less valuable to the complainant than it would otherwise be. That was a matter for the consideration of the legislature making the grant. Memphis Gaslight Co. v. Shelby County Taxing Dist., 109 U. S. 398, 27 L. ed. 976, 3 Sup. Ct. Rep. 205. * * * The

precise objection pressed against the acts is that they constitute vicious class legislation, in that, as alleged in the bill, they apply to only two of the seventy-five railroad companies operating or controlling lines of road in the state, and the classification is unnatural and arbitrary. The acts do divide the railroad companies in the state into two classes: (1) Those 'not paying an ad valorem tax to the state,' and (2) those paying such tax; and they impose a privilege tax upon those of the former class only. This is class legislation, undoubtedly, but it is not of the vicious or forbidden kind. It applies equally to all corporations that are or may be in like situation or circumstances, and thereby meets the first requirement of valid class legislation; and it makes a natural and reasonable classification, thereby meeting the other requirements of such legislation. Lowe v. Kansas, 163 U. S. 81, 41 L. ed. 78, 16 Sup. Ct. Rep. 1031; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Jones v. Brim, 165 U. S. 180, 41 L. Ed. 677, 17 Sup. Ct. Rep. 282; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 588, 41 L. Ed. 560, 17 Sup. Ct. Rep. 418; Haves v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Columbus Southern R. Co. v. Wright, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396. That it meets the first of these requirements is self-evident, and that it meets the other one becomes manifest when it is considered that those companies upon which the privilege tax is imposed are not otherwise making any contribution to the support of the state government that protects their business and property in the same manner that it does those of the companies of the other class, which are contributing their

part to that support by the payment of an ad valorem tax. What sounder and more natural reason could be found for a classification than that these are already bearing some of the burdens of government and those are not? A classification with such a reason to support it (and it may have been prompted by others which the court may not and need not state or discover) cannot justly be characterized as unnatural and arbitrary. * * * It has been suggested, with the emphasis of repetition, that these acts were not passed in good faith, but with the unjust motive of depriving the companies affected thereby *of an advantage* previously conferred. Of this we see no indication. Moreover, the courts have nothing to do with the motives of the legislature, nor with the policy or impolicy of its laws. * * * A like reply must be made to the other suggestion, that this tax, if now sanctioned, may hereafter be so increased as to equal an ad valorem tax, which would make the burden upon complainant as great as if it had no exemption at all. If the legislature has the legal right to impose a privilege tax the amount of the imposition is a matter within its discretion. 'Our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction.' Delaware Railroad Tax, 18 Wall. 231, sub nom. Minot v. Philadelphia, W. & B. R. Co., 21 L. ed. 896; California v. Central P. R. Co., 127 U. S. 1, 41, 32 L. ed. 150, 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593."

In the case of *Alaska Fish Co. v. Smith*, 255 U. S. 44, the acts attacked levied license taxes of $2.00 a barrel and $2.00 a ton respectively, upon persons manufacturing fish oil, fertilizer and fish meal in whole or in part from herring. The Court had the following to say:

"The complainant alleges that the tax will prohibit and confiscate the plaintiff's business, which is that of manufacturing fish oil, fertilizer, fish meal and by-products from herring either in whole or in part; that the tax unreasonably discriminates against the plaintiff, as it levies no tax upon the producers of fish oil, &c., from other fish, and is otherwise extortionate; * * *

"The prophecies of destruction and the allegations of discrimination as compared with similar manufactures from salmon are denied by the Attorney General for Alaska, the latter denial being based upon a comparison of the statutes which of course is open. We are content, however, to assume for the purposes of decision, that not to speak of other licenses, the questioned acts do bear more heavily upon the use of herring for oil and fertilizer than they do upon the use of other fish. But there is nothing in the Constitution to hinder that. If Alaska deems it for its welfare to discourage the destruction of herring for manure and to preserve them for food for man or for salmon, and to that end imposes a greater tax upon that part of the plaintiff's industry than upon similar use of other fish or of the offal of salmon, it can hardly be said to be contravening a Constitution that has known protective tariffs for a hundred years. Rast v. Van Deman & Lewis Co., 240 U. S. 342, 357. Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk (Citing cases)." * * *

"* * * We know of no objection to exacting a discouraging rate as the alternative to giving up a business when the legislature has the full power of taxation. * * * The

legislature was warranted in treating the making of oil and fertilizer from herring as a different class of subjects from the making of the same from salmon offal."

The Method of the Imposition of the Tax.

The ordinance required an applicant to file a written application with the governing body of the municipality setting forth the location of the place and premises in or at which the business was to be conducted, the area of the ground space thereof, and a diagram of the same; and further required an annual tax or fee for revenue of ¾ of 1 cent per square foot of the ground area of the place in or at which the business was proposed to be carried on (R. p. 10).

There is no proof in the record that the appellants are, in any way, discriminated against in the method of the imposition of the license fee. In the case of *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 57 S. Ct. Rep. 868 at 874, this Court said:

> "In no case do appellees (taxpayers) sustain the burden which rests upon them of showing that there are no differences, between the exempt employers and the industrial employers who are taxed, sufficient to justify differences in taxation."

However, in their brief, the appellants charge that the ordinance is arbitrary in that it provides a license fee measured by the method of ¾ of one cent per square foot of area. Seemingly, appellants consider that some other means of fixing the tax would be better but no contention is made that the rate would not fall equally on all embraced within the terms of the ordinance.

Outdoor storage is commonplace in many lines of business today. Large quantities of goods, which do not require the

protection of buildings, are deposited in the open involving only ground area. This is demonstrated in the present case where the operations of the appellants utilized 56 acres. *Pattison & Bowns, Inc.* v. *Saddle River Twp.*, 129 N. J. L. 135. By employing ground area, the extent thereof being selected by the applicant in making his application, a definite method for the calculation of the fee, fair and honest to both the municipality and the taxpayer, was arrived at which was applicable to both indoor and outdoor commercial warehousing and was superior to a method of measurement by volume, as suggested by the appellants. When it is remembered that the coal in this case was stored in piles 50 to 70 feet high (*Pattison & Bowns, Inc.* v. *Saddle River Township*, 129 N. J. L. 435), each of such piles having a greater volume than an ordinary building, no tax preference was given to indoor storage, in view of the fact that the structure necessary for indoor storage would be an improvement subject to taxation. But, in any event, this Court is not concerned with considerations of this character. In the case of *Carmichael* v. *Southern Coal & Coke Co.*, *supra*, this Court said:

> "Administrative convenience and expense in the collection or measurement of the tax are alone a sufficient justification for the difference between the treatment of small incomes or small taxpayers and that meted out to others. * * * (Citing cases.)

To the same effect is *N. Y. Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573, 58 S. Ct. Rep. 721, wherein the Court said:

> "Reports which must be filed with the Department of public service on the basis of approved systems of accounting suggest an administrative convenience in the

collection and verification of the tax which might properly have been taken into account by the city's Legislature."

Outdoor warehousing is a distinctive business species of the general classification, commercial storage. Even if it were the case, it would be no valid objection that the tax falls heavier on one type of the group than on others. In *Fox v. Standard Oil Co. of N. J.*, 294 U. S. 87, 55 S. Ct. Rep. 333, the Court said:

"A chain, as we have seen, is a distinctive business species, with its own capacities and functions. Broadly speaking, its opportunities and powers become greater with the number of the component links; and, the greater they become, the more far-reaching are the consequences, both social and economic. For that reason the state may tax the large chains more heavily than the small ones, and upon a graduated basis, as indeed we have already held. State Board of Tax Commissioners v. Jackson, supra; Liggett Co. v. Lee, supra. Not only may it do this, but it may make the tax so heavy as to discourage multiplication of the units to an extent believed to be inordinate, and by the incidence of the burden develop other forms of industry." (citing cases).

The appellants cannot complain because their interests might be better off under a different method. In *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 57 S. Ct. Rep. 772, the Court said at page 776:

"We cannot say that classification of chains according to the number of units must be condemned because another method more nicely adjusted to represent the differences in earning power of the individual stores might

have been chosen, for the legislature is not required to make meticulous adjustments in an effort to avoid incidental hardships. It is enough that the classification has reasonable relation to the differences in the practices of small and large chains. The statute bears equally upon all who fall into the same class, and this satisfies the guaranty of equal protection."

In *N. Y. Rapid Transit Corp. v. City of New York*, *supra*, the Court said:

"In taxing utilities as a class, the legislature is not required to make 'meticulous adjustments' for a particular sub-class of utility."

It is appellants' contention that the license fee must be either borne by Erie out of revenues, or paid by the storer of the goods. If the latter course were pursued they say that it would result in a diversion of traffic to competing carriers who, presumably, must be also furnishing free storage to coal shippers contrary to the decision of this Court in *B. & O. R. R. Co. v. 305 U. S.*, 507, 59 S. Ct. Rep. 284, *supra*. In any event, Erie is not entitled to rely on its unlawful agreement to bear the loss on storage, as the basis for attacking the ordinance. As to the argument that it is not feasible to modify the filed tariff rates, which of course need not be done if a direct charge for storage be made on the storer by the warehouse company, this Court in *New York Rapid Transit Corp. v. City of N. Y.*, 303 U. S. 573, 58 S. Ct. Rep. 721 *supra*, had the following to say:

"The disadvantages complained of, as to fare limitations, are applicable only to the corporation, a single member of a class of utilities. It is quite fortuitous that this particular corporation must seek adjustments in fare

in a peculiar way. 'The legislature is not required to make meticulous adjustments in an effort to avoid incidental hardships.' See Great Atlantic & Pac. Tea Co. v. Grosjean, 301 U. S. 412, 424, 57 S. Ct. 772, 776, 81 L. Ed. 1193, 112 A. L. R. 293. 'If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict.' Fox v. Standard Oil Co., 294 U. S. 87, 102, 55 S. Ct. 333, 339, 79 L. Ed. 780."

The appellants further argue that the ordinance is unreasonable and the statement is made that the license fee is fixed without relation to the value of the privilege of conducting the business—a comparison being made to the amount of other license fees of the municipality. The record shows that appellants' business is, by far, the largest in the municipality, which is a residential community of 3,169 inhabitants (Official 1940 Census). It covers a substantial part of a 67½ acre area extending practically the entire breadth of the Township (Ex. P-1, R. 18A); its nature is such, accompanied as it is by the nuisance of dirt, noise, appearance, and added police and fire problems, that it would be barred under the zoning laws of New Jersey in all business or residential areas of any other municipality. If it were a private warehouse it would pay personal property taxes in about the amount of the license fee.

Based on the ground area of 45,000 square feet for each pile of coal (R. 204), with the quantity in each pile being from 20,000 to 25,000 tons (R. 68), the license fee of ¾¢ per square foot would mean a tax of from $.0135 to $.016 per ton. Based on the appellants' estimate of the area of the entire plant at 1,198,500 square feet (Ex. P-2, R. 18), and their estimate of the capacity as 100,000 tons (Ex. D-4, R. 250, 204-208), the license fee would mean a tax of 2¼¢

per ton. A portion of the coal in storage belonged to customers from Passaic and Bogota (R. 163). If the coal had been stored in the yards of such owners in Passaic or Bogota, or in a private yard at Saddle River Township, it would have been subject to a personal property tax at its value of from $4.94 to $9.90 per ton, which at the average Saddle River Township rate of $5.85 per $100.00 (R. 208), would have meant a tax of from 29¢ to 58¢ per ton.

Assuming, without conceding that the appellants may complain in this Court as to the amount of the tax, the best proof that the license fee in this case is not unreasonable is that the personal property taxes (if not in a considerable greater amount than the license fee, at least not in a material lesser amount) were annually paid prior to 1940.

Common knowledge tells us that the personal property taxes were passed along to the buyers of the coal and that the same thing would be done with the license fee. Since the personal property taxes did not injure the business of the yard, the conclusion must likewise be reached that the license fee would not seriously affect the business. The case is to be determined according to general rules and therefore the unusual and manifestly illegal rebate agreement (Ex. P-4, R. 20), whereby Erie assumed the costs of operation, cannot alter this conclusion. *Federal Compress & Warehouse Co.* v. *McLean*, 291 U. S. 17, 54 S. Ct. Rep. 267, 269.

The appellants' business was not singled out for the imposition of a license fee for revenue. As compared with the license fee in the present case of ¾¢ per square foot, Saddle River Township has other licensing ordinances to raise revenue and the fees in these run from about 5¢ per square foot of the area used in the business, in the case of carnivals (R. 213), to about 31¼¢ per square foot of area, in the case of saloons (R. 212), which license fees are

in addition to personal property taxes. There also exists a federal tax on coal of 1¢ per ton (R. 169) which is, of course, imposed throughout the entire country without regard to local taxation.

License fees of the character imposed in this case are, contrary to appellants' statement in their brief, a common means of raising revenue for the support of the government in New Jersey. In the case of *Giant Tiger Corp., Camden v. Camden*, 122 N. J. L. 240, the Court held a license fee of $5100.00 a year imposed on a store, was not improper despite the fact that the license fee was in addition to personal property taxes.

The appellants criticize the police regulations in the ordinance. In so doing, they misconceive or misstate the municipal law of New Jersey. In New Jersey the right of a municipality to impose a license fee for revenue is a right which flows from the delegated governmental power to tax and is separate and apart from the police power. This is pointed out in the case of *North Hudson County Railway Co. v. Hoboken*, 41 N. J. L. 71, at Page 81 the Court said:

> "The distinction between the power to license, as a police regulation, and the same power when conferred for revenue purposes, is of the utmost importance. If the power be granted with a view to revenue, the amount of the tax, if not limited by the charter, is left to the discretion and judgment of the municipal authorities."

This is also the general rule, *Gundling v. Chicago*, 177 U. S. 183.

R. S. 40:52-1 and R. S. 40:52-2 conferred on the municipality the power both to regulate the business and to impose a fee for revenue. There has never been any question in New Jersey that both matters may be embraced in the same

ordinance and the Court below, so applied the law to the ordinance in this case. This court follows the construction placed on the State Law by the State Court, *J. Bacon & Sons v. Martin*, 305 U. S. 380, 59 S. Ct. Rep. 257. The cases cited by the appellants in their brief to the effect that the police power cannot be used for raising revenue are cases where a municipality, by its ordinance, availed itself of only its police powers and failed to declare, as was done in the present case, that the fee was imposed for revenue (Ex. S-1, R. 9, 10).

But the contention, in any event, is not pertinent in the present case. The convictions under review (R. p. 6) were for carrying on the storage of personal property in a warehouse engaged in the business of storing goods for hire without the license required by Section 1 of the ordinance —in short, for operating without paying the license fee. No charge was made against the appellants for violating any of the police regulations established by the ordinance and consequently any discussion in regard to the reasonableness of Sections 4, 5, and 6 of the ordinance is purely academic. Furthermore, if any of those sections were unreasonable, they would be expunged by operation of Section 8 of the ordinance which provided that if any part thereof should be illegal or unconstitutional, such invalidity would not impair the remainder of the ordinance (R. p. 11).

The appellants further claim that the municipality is without power to prescribe a regulation prohibiting persons, other than the corporate entity which might be the owner or operator, from using or being employed in unlicensed premises. The appellants propose that the only one who could be penalized in the present case is the operator, the corporate entity Independent Warehouses, Inc., a corporation of New York, which received $500.00 a year for the use of its name for the operation of the plant, and that the

appellant Thompson was deprived of due process and the equal protection of the laws when he, as manager of the plant, was convicted under the ordinance. The argument presumes that the legislature of New Jersey intended ordinances of the character of the one in question in this case to be unenforceable, because unless the foreign corporate entity appeared of its own volition within the municipal jurisdiction, its agents and servants could continue the violation with immunity. The question is one of the construction of the provisions of the law of New Jersey granting authority to the municipality and, as above stated, this court will follow the construction as determined by the State. The Court below, said in regard to the New Jersey law (R. 273):

> "It was within the competency of the local legislative body to render this a punishable offense, essential to the enforcement of the policy of the ordinance; the power is an integral part of the general grant of authority to license and regulate contained in sec. 40:52-1 (g) and 40:52-2, *supra*."

On the question of the equal protection of the law, this Court, in *Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412, 57 S. Ct. 772 said at page 777:

> "In the exercise of its police power, the state may forbid, as inimical to the public welfare, the prosecution of a particular type of business or regulate a business in such manner as to abate evils deemed to arise from its pursuit. Whatever a state may forbid or regulate, it may permit upon condition that a fee be paid in return for the privilege and such a fee may be exacted to discourage the prosecution of the business or to adjust competitive or economic inequalities."

In the case of *Carmichael v. Southern Coal & Coke Co.* 301 U. S. 495, 57 S. Ct. Rep. 868, the Court had the following to say at page 872:

> "Taxes, which are but the means of distributing the burden of the cost of government, are commonly levied on property or its use, but they may likewise be laid on the exercise of personal rights and privileges."

And further at page 878:

> "A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. See Cincinnati Soap Co. v. United States, *supra*."

III.

The ordinance is not indefinite or uncertain.

(Appellants' Point Relied on 5, R. 283).

Much of the matter discussed in appellants' brief under this point has already been considered under our II.

It is the appellants' contention that the ordinance requires an applicant to speculate on January 1st of each year how much area the volume of business would require during the succeeding year. It should be sufficient to say that the appellants, with their outdoor storage, would be in a far better position than an applicant for a license to do business indoors in a permanent structure, whether it be ware

housing or any other class of business for which a license might be required. The outdoors warehouseman might modify the quantity of area to be utilized from year to year or even increase the same during the year according to his own estimates of his needs and thus pay a fee for only what he actually used; while a licensee in a permanent structure might, in all probability, be paying a fee for a license which he would not fully enjoy. Under the ordinance in question, if there was anything indefinite or uncertain resulting, it could only arise through the indefiniteness or uncertainty contained in an applicant's written application, description of the location, and diagram, which he was required to file and as to which the license would be applicable. The fee would be a mere arithmetical computation based on the area requested by the applicant to be licensed. The Court below in construing the ordinance, said (R. 273):

> "Under the ordinance in the case at hand, the warehouse corporation may protect itself against the inclusion of areas not devoted to storage in the calculation of the tax."

The appellants cannot be heard to complain about the mechanics of the ordinance in relation to the granting of the license. If they had presented an application which had been denied, the law of New Jersey would have afforded them ample and complete relief by review on *certiorari* in case there was any basis to their conjectures of harmful treatment. In the absence of good cause, a municipality of New Jersey may not refuse a license for revenue and therefore, under the ordinance in this case, an applicant would be entitled to receive a license for whatever area he set forth in his application and the diagram accompanying the same. The rule in respect to prohibited indefiniteness is stated in *Gorin* v. *U. S.*, 312, U. S. 19, 61 S. Ct. Rep. 429, 433 as follows:

> "We find no uncertainty in this statute which deprives a person of the ability to predetermine whether a contemplated action is criminal under the provisions of this law * * * The language employed appears sufficiently definite to apprise the public of prohibited activities."

The ordinance in this case, in unequivocable language, declared to all the public that any and all persons who thereafter operated a commercial warehouse within the limits of the Township, without a license, would be subject to the penalties therein prescribed. Nothing could be more definite and certain than this.

The appellants object to the use of the term "place or premises". These are the words used in the authorizing statute R. S. 40:52-1 (g). They also object to the use of the words "ground area". All of these words have well accepted, definite meanings (Words and Phrases). In any event, the convictions under review were for operating without a license and the question does not arise in this case whether the appellants or any of them could be convicted, if they ever should be so charged, of having failed to take out a license for all of the premises owned by them, as distinguished from the premises used by them.

The appellants claim that the Township officials "construed" the term "place or premises" to be Block 106-D on the assessment map because that point was, by way of description, alleged in the complaint made by the Chief of Police, as the place where the violation occurred (R-5). In the absence of a demand for more particulars, any or no particular description could have been used in the complaint. The lack of certainty must be found in the ordinance and the complaint would have no bearing. It might be noted, however, that the appellants voluntarily admitted operation at the place charged in the complaint (R-7).

It is further appellants' contention that the ordinance gave to the Township Committee the discretion to determine the area to be licensed. Appellants' Exhibit P-2 (R-18) shows 1,198,300 sq. feet occupied and used in the plant with an additional 462,350 sq. feet in railroad tracks, of which 107,240 sq. feet are classified as storage plant (primary). Had appellants applied for and received a license covering the 1,198,500 sq. feet admitted by them to be used for storage and thereafter there had been a conviction for using railroad tracks or any other part of the unoccupied area for storage, the state courts could have been called upon to construe the meaning of the words "place or premises" and "ground area". But if and when that happened, this Court would not interfere with that construction. *J. Bacon and Son* v. *Martin, supra*.

Appellants complain as to the clause in the ordinance that "the Township Committee may revoke any such license for sufficient cause after notice and hearing." This is verbatim the words of R. S. 40:52-2. Appellants lose sight of the fact that the scope of the present case is a review of the power of the state to tax their business rather than any question as to the power to impose police regulations. The appellants were convicted under the taxing feature of the ordinance and not under the police regulations. On the score of police regulations, the present ordinance must be read in conjunction with other ordinances of the municipality in respect to zoning, building, health, and fire prevention and if, after notice and hearing, it was determined that the continuance of a licensed business would violate the regulations prescribed by any of those ordinances, it would appear that the governing body might properly revoke the license issued under the present ordinance. However, if a licensee felt aggrieved in case such action was taken, he would have full and ample recourse to the state courts to

determine whether the action was proper. Of course, the operation of any police regulation is not in issue in the present case because the appellants were not convicted for anything else other than the failure to take out a license; but if all of the clauses in the ordinance comprising police regulations be expunged therefrom, there still remains the requirement to take out a license and pay the municipality a fee for municipal revenue with a penalty for the failure to do so. The State's right to impose such a tax in such a manner is today unquestionable.

IV.

The ordinance does not impose penalties which deny appellants due process or equal protection of the laws.

(Appellants' Point Relied on 6, R. 288).

The appellants' point is that the ordinance would result in cumulative penalties of such an amount as would prevent them from carrying on their business without securing the required license. Presumably this is what the legislature of New Jersey intended when it enacted R. S. 40:52-2 which prohibited unlicensed places from being carried on, and R. S. 40:49-5 which authorized penalties for the violation of ordinances. Section 7 of the ordinance in question (R-10) is substantially a verbatim statement of the provisions of R. S. 40:49-5 and is the penalty clause used for the enforcement of all ordinances in New Jersey so that in reality appellants' attack is made not only on R. S. 40:49-5, but also on the constitutionality of all penal ordinances in New Jersey.

It is appellants' argument that the rule applicable to penalties imposed in railroad rate legislation should be

applied to licensing ordinances and appellants' brief cites a number of these railroad cases. However, the contention ignores the reason which exists for the rule in the railroad cases. The rule is stated in *Ex Parte Young*, 209 U. S. 123, 147 as follows:

> "Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid."

At common law a common carrier may not refuse to accept goods for shipment, *Missouri Pacific R. R.* v. *Tucker*, 230 U. S. 349, 374, and was required to carry the same at a reasonable rate. Rates may be prescribed as a legislative function, *Louisville & Nashville R. R.* v. *Garrett*, 231 U. S. 298, but the rates, when so prescribed, must furnish some return upon the investment. Consequently, a common car-

rier may not be penalized by a legislative enactment which requires him to carry the goods at a rate which has been fixed without a prior hearing being afforded as to the reasonableness thereof. The reason for the rule arises from the obligation imposed by law on the common carrier to operate. But the situation in respect to a licensee under the ordinance in question is different. In New Jersey, commercial warehouses are not public utilities and may do business with whomsoever and on whatever terms are deemed proper and without any legal guarantee of a profit. In *D. L. & W. R. R. Co.* v. *Central Stockyards and Transit Co.*, 45 N. J. Eq. 50, 46 N. J. Eq. 280, 6 L. R. A. 855, 860 the Court said:

> "There can be no doubt, I think, that a warehouseman is not required, by any general rule of law, to receive goods on storage against his will. In Addison on Contracts, (p. 630), it is said: 'A man cannot be made a depositary without his knowledge and consent; he cannot have the possession of another man's property, with its accompanying duties and responsibilities, forced upon him against his will.' This must be so from the very nature of such transactions, for all bailments not made by force of statutory regulation rest in contract, and no contract can exist without consent, express or implied."

On account of the duty imposed on the common carrier which results in the right to a reasonable return, the legality of operating orders against the carrier is not apparent on the face of such orders but depends upon a showing of extrinsic facts, *Wadley &c So. Ry.* v. *Georgia*, 235 U. S. 651; but in the present case, the warehouseman is merely prohibited from doing business unless he files an application and receives a license. Under the state law, before

the passage of the ordinance; and after public notice, a hearing is afforded all persons interested, R. S. 40:49-2b. After its passage, any person deeming himself affected thereby may review the legality thereof in the state courts. *Percello* v. *Ocean Grove*, 100 N. J. L. 407; *Ross* v. *Mayor etc. Edgewater*, 115 N. J. L. 477; 299 U. S. 543; 57 S. Ct. Rep. 37. In the present case, the appellants refused or failed to make application for a license, but admittedly continued operating without regard to the ordinance and without having made any attack on it except to file a protest (Ex. P-16, R. 59). Even under the common carrier rule, in *Wadley & So. Railway* v. *Georgia*, 235 U. S. 651, 669 (one of the cases cited by appellants) the Court said:

> "But where, as here, after reasonable notice of the making of the order, the carrier failed to resort to the safe, adequate and available remedy by which it could test in the courts its validity and preferred to make its defense by attacking the validity of the order when sued for the penalty, it is subject to the penalty when that defense, as here, proved to be unsuccessful."

There can be no more basis to appellants' contention than an argument that the Federal Price Control Act and Income Tax Law are unconstitutional because they impose heavy penalties for the failure to file the returns required thereunder prior to matters contained in such returns being litigated. If, upon the filing of the application required under the present ordinance, the appellants felt themselves aggrieved in any respect by the action of the municipal governing body in connection therewith, they were fully protected under the law of New Jersey in the state courts by their right to a review. To avoid the danger of the imposition of a penalty for the failure to pay the required license

fee, they could have; (a) discontinued further business in Saddle River Township until the matter was determined, or (b) paid the license fee under protest and recovered it back in the event they were successful in maintaining their position, pursuant to the rule in *Ocean Grove Association* v. *Bradley Beach*, 91 N. J. L. 364, *Mayor etc. of Jersey City ads. Riker*, 38 N. J. L. 225; *Jersey City* v. *O'Callaghan*, 41 N. J. L. 349, and *Cox* v. *Tax Collector*, 79 U. S. 204.

The ordinance in the present case presents the simple question of a penal enactment. It was the mandate of the state, acting in this case through the municipality, that any and all commercial warehouses, before doing business in the Township, should file an application and secure a license for the area which they selected in which to do business. To compel obedience to this mandate the state might impose such penalties as it deemed necessary. Although this court will not inquire into the policy underlying the enactment, it goes without saying that without cumulative penalties a license ordinance of this character would be unenforceable because otherwise, on the payment of a single penalty of $200.00, immunity from further prosecution in the future would be obtained. However, as pointed out by the Court below, under the convictions under review in this case, the question of cumulative penalties does not arise. If the clause, Section 7 of the ordinance (R-11) that "each day shall constitute a separate offense" is legally objectionable, it is expunged by Section 8 which provided that in the event any part of the ordinance should be illegal, the same would not impair the remainder. Even under the common carrier cases, it was held that penalties which deny due process of law will not render a rate statute unconstitutional if they are separable. *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298, 311.

All of appellants' contentions in respect to due process and equal protection of the laws are necessarily without basis for the reason, that the principle is well established, that, when a statute, valid upon its face, requires the issue of a license or certificate as a condition precedent to carrying on a business or following a vocation, one who is within the terms of the statute, but has failed to make the required application, is not at liberty to complain because of his anticipation of improper or invalid action in administration. *Gundling* v. *Chicago*, 177 U. S. 183, 186, 20 S. Ct. 633, 44 L. Ed. 725; *Lehon* v. *Atlanta*, 242 U. S. 53, 55, 56, 37 S. Ct. 70, 61 L. Ed. 145; *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 553, 554, 37 S. Ct. 217, 61 L. Ed. 480, L. R. A. 1917 F, 514, Ann. Cas. 1917C, 643.

V.

The New Jersey Court of Errors and Appeals did not err in affirming the judgments of conviction of appellants.

Appellants make this point in their brief but the same is not set out in their statement of points to be relied upon (R. 287).

As similarly done by the appellants, the appellees rely upon the facts, arguments and authorities above set forth under Points I to IV inclusive of this brief.

CONCLUSION.

For the reasons above set forth, appellees pray that the judgments of the New Jersey Court of Errors and Appeals here under review in the above entitled causes be affirmed.

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p. 5.

SUPREME COURT OF THE UNITED STATES

No. 83.—October Term, 1946.

Independent Warehouses, Inc., Pennsylvania Coal Company, Erie Railroad Company and James Thompson, Appellants,

v.

William Scheele, Recorder of the Township of Saddle River, and the Township of Saddle River.

Appeal from the Court of Errors and Appeals of the State of New Jersey.

[April 14, 1947.]

Mr. Justice Rutledge delivered the opinion of the Court.

An ordinance of Saddle River Township, New Jersey, forbids carrying on the business of storing goods for hire except upon the payment of an annual license tax.[1] Independent Warehouses, Inc., and Thompson, an agent of that company, have been convicted and fined for conducting such a business without procuring the license or paying the tax. The convictions have been sustained by New Jersey's highest court.[2] The appeal here seeks to have that judgment reversed on the basis that the business done was exclusively interstate and consequently the application made of the ordinance contravenes the commerce clause of the Federal Constitution, Art. I, § 8. Fourteenth Amendment objections also are raised.[3]

The main thrust of the argument has been toward the commerce clause phase of the case. In this the contro-

[1] The material terms of the ordinance appear at note 9 *infra* and text.

[2] See text Part I *infra*. A prior suit in a federal district court to enjoin enforcement was dismissed because of the existence of a "plain, speedy and efficient remedy" in the state courts. *Independent Warehouses* v. *Saddle River Township*, 52 F. Supp. 96; 28 U. S. C. § 41 (1).

[3] Those objections are discussed in Part III of this opinion.

versy is of the familiar "interruption" or "cessation" type. The issue accordingly requires only a determination of the proper application to be made of well-established legal principles to the particular circumstances. It is whether the cessation taking place in the movement of goods interstate, as shown by the record, is of a nature which permits the state or a municipality to tax the goods or services, here the business of storing them, rendered in connection with their handling.[4]

The governing principles were stated in *Minnesota* v. *Blasius*, 290 U. S. 1, 9–10, as follows:

> ". . . the States may not tax property in transit in interstate commerce. But, by reason of a break in the transit, the property may come to a rest within a State and become subject to the power of the State to impose a nondiscriminatory property tax.[5] Such an exertion of state power belongs to that class of cases in which, by virtue of the nature and importance of local concerns, the State may act until Congress, if it has paramount authority over the subject, substitutes its own regulations. The 'crucial question,' in determining whether the State's taxing power may thus be exerted, is that of 'continuity of transit.' *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95, 101.
>
> "If the interstate movement has not begun, the mere fact that such a movement is contemplated does not withdraw the property from the State's power to tax it. . . . If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and

[4] "A non-discriminatory tax upon the business of storing" goods which are not yet in interstate commerce is not forbidden. *Federal Compress Co.* v. *McLean*, 291 U. S. 17, 21.

[5] See note 4.

convenience in the course of the movement. . . . Formalities, such as the forms of billing, and mere changes in the method of transportation do not affect the continuity of the transit. The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied. . . .

"Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power."

Since the circumstances characterizing the interruption are of controlling importance, we turn to the details of the movement and of the stoppage shown by the record.

I.

The suit is the culmination of a controversy extending back to 1939, with earlier litigious chapters in the state and federal courts. It grows out of the operation of facilities for storing and handling coal under various arrangements between the Erie Railroad Company and other corporations affiliated for this and other enterprises by stock ownership or by contract.

The Pennsylvania Coal Company is a wholly owned subsidiary of Erie. It owns and operates coal mines in Pennsylvania. In 1901 it acquired 67.25 acres of land in Saddle River Township, New Jersey. This acreage and its facilities, known as Coalberg, are located on the New York, Susquehanna and Western Railroad and perform functions connected with that road's operations not material to this cause. Coalberg also is connected di-

rectly with the Bergen County Railroad, a freight cutoff of Erie. Its chief purpose, and the only one relevant to this controversy, is to provide storage for coal shipped in from the Coal Company's Pennsylvania mines and later shipped out to various destinations.

Prior to 1939, Coalberg was operated by the Coal Company or its lessees as a private business, not as a public utility. During this time the Township levied personal property taxes upon the coal in storage, assessing and collecting them from its owners.[6] These were, as they are now, chiefly coal distributors using Coalberg's storage facilities, principally because of their accessibility to distributing centers, especially in the vicinity of New York City, and to shipping facilities both by rail and by water.[7]

In 1939, however, by arrangements to be set forth involving Erie, the Coal Company and Independent Warehouses, Coalberg was converted into a public utility to serve shippers of coal on Erie lines. Under New Jersey law, goods stored in warehouses conducted for hire are exempted from personal property taxes. Rev. Stat. N. J. § 54:43.20. The Township, despite the change in Coalberg's mode of operation, continued to levy such taxes on the stored coal until the 1940 assessment was invalidated in the state courts. *Pattison & Bowns* v. *Saddle River Township*, 129 N. J. L. 135; 130 N. J. L. 177.

The municipality's resulting loss in revenue amounted to about eight per cent of the total collected for local, county and state purposes. To make up for this, as its

[6] In 1921 the New Jersey Supreme Court sustained the imposition of these taxes against attack on various grounds. *Pennsylvania Coal Co.* v. *Saddle River*, 96 N. J. L. 40.

[7] Coalberg is located conveniently to tidewater ports, as well as rail facilities for distribution in northern New Jersey and elsewhere. The distributors using Coalberg's facilities forward their coal not only to the near-by metropolitan area of New York City and northern New Jersey, but also to the New England States.

brief here candidly admits, the Township enacted the ordinance now in question, acting under other provisions of state law. N. J. Stat. Ann. §§ 40:52–1, 40:52–2. The effect was to shift the direct incidence of taxation from the owners of the coal, *i. e.*, the shipper-distributors, to the operator of the storage business and to change its character from a direct property tax to that of a license or franchise tax for the privilege of conducting that business in the state. The amount of revenue thus produced, though in dispute, substantially will repair the loss suffered from invalidation of the property tax. This suit is the outgrowth of the Township's effort to enforce the new taxing provisions.

It is necessary to state in some detail the arrangements made in 1939 by which the change was brought about in the mode of operating Coalberg. An agreement then made between the Coal Company and Erie provides that the former shall operate Coalberg "as a public service facility for shippers of prepared anthracite coal on Erie lines desiring storage space in accordance with and under the rates named in a certain Tariff on file with the Interstate Commerce Commission and the Public Utilities Commission of the State of New Jersey. . . ." The agreement recites that it is made in view of the considerations that the Coal Company has no need for Coalberg's storage facilities and that they are of use to Erie in affording "facilities for the storage of prepared anthracite coal for shippers on Erie lines whereon said Coalberg Storage Yard is located so that shipments of coal may not be diverted to other and competing lines on which facilities for coal storage are available. . . ." Erie pays the net monthly loss, if any, of operating the yard and the Coal Company remits to Erie the net monthly surplus, if any. Erie also undertakes to maintain an agent at Coalberg duly authorized on its behalf to issue warehouse receipts for coal placed in storage by shippers.

The Coal Company has discharged the operating function under its agreement with Erie by an arrangement also made in 1939 with Independent Warehouses, which is a New York corporation engaged in the warehousing business. The Coal Company leased Coalberg to Independent Warehouses for $1.00 a year and the latter undertook to operate the plant for a consideration which now amounts to approximately $500 a year. The agreement between the Coal Company and Erie governs the manner of Coalberg's operation by Independent Warehouses.

Under these arrangements purchasers from the Coal Company who ship coal from the mines designate the destination on the shipping papers. If they designate Coalberg, the coal is sent there on railroad cars. It is unloaded to the storage pile where it is kept until ordered out by the owner. It is then reloaded into railroad cars, and when it is reshipped there is a new billing to the new destination. Most of the coal, after it has been stored, goes to states other than New Jersey. Some, however, is marketed in New Jersey. It is disputed whether there is any local distribution in the Township, but if so the amount is comparatively insignificant.

The financial arrangements under the governing tariff are as follows. On arrival of the shipments at Coalberg the transportation charges on the movement from the mine to Coalberg are paid to the Erie freight agent at Coalberg. When the coal is moved again after storage, the remainder of the through tariff rate from the point of original shipment at the mine in Pennsylvania is paid. This arrangement is known as the transit privilege. "The privilege of transit enables grain [here coal] to be shipped from point A to point B, there to be stored, marketed, or processed, and later reshipped to point C at a rate less than the combination of the separate rates from A to B and B to C." *Board of Trade* v. *United States*, 314 U. S. 534, 537–538, and authorities cited.

The storage facilities given to shippers are free for a period of two years,[8] although a charge is made by Erie for unloading the cars into the stock pile and for reloading the cars for reshipment. A charge is also made by Independent Warehouses upon such coal owners as obtain warehouse receipts from it.

The licensing ordinance applied in this case was adopted in 1943, following upon the New Jersey decision in *Pattison & Bowns v. Saddle River Township, supra*. The ordinance provides:

> "No person, firm or corporation shall conduct or carry on the business of the storage of personal property in a warehouse engaged in storing goods for hire or work in, occupy, or, directly, or indirectly in any manner whatsoever, utilize any place or premises in which is conducted or carried on the storage of personal property in a warehouse engaged in the business of storing goods for hire, unless and until there shall be granted by the Township Committee of the Township of Saddle River in accordance with the terms of this ordinance, and shall be in force and effect, a license to conduct said business for the place and premises in or at which said business shall be conducted and carried on."

The ordinance specifies that for the license there shall be charged and collected in advance an annual fee of three-quarters of a cent for each square foot of ground in the

[8] The tariff provides: "The period of time allowed for the storage privilege and protection of the through rate from point of origin to ultimate destination shall be two (2) years from the date of delivery at storage point, as shown on the inbound freight (expense) bill. The Erie Railroad reserves the right to require owners to remove their coal at the expiration of the two years period. Any coal which is not reshipped within two (2) years will lose the privilege of being reshipped at the through rates from point of origin to destinations beyond the storage yard. . . ."

Township where the business is carried on. There is also a penalty clause,[9] in addition to other provisions not now pertinent.

Independent Warehouses did not apply for the license or pay the tax for 1943. Consequently that company and Thompson were convicted in the Magistrate's Court before appellee Scheele, the Recorder of the Township, for having violated the ordinance by conducting the storage operations at Coalberg without complying with its requirements. Each was fined $200.[10] The Coal Company and Erie were allowed to intervene when the case went before the New Jersey Supreme Court, because of their obvious interest in the outcome of the litigation. That court held the ordinance unconstitutional as an undue burden on interstate commerce and reversed the convictions. 132 N. J. L. 390. In turn the New Jersey Court of Errors and Appeals reversed the Supreme Court's determination. 134 N. J. L. 133. It held that the ordinance was valid under the provisions of state law, and that neither the commerce clause nor the Fourteenth Amendment guaranties relied upon had been infringed. The case comes here on appeal, 329 U. S. —, pursuant to § 237 (a) of the Judicial Code. See *King Mfg. Co. v. Augusta*, 277 U. S. 100; *Jamison v. Texas*, 318 U. S. 413, 414.

[9] "Any person, firm or corporation who shall violate any term or provision of this ordinance shall upon conviction thereof be subject to imprisonment in the County Jail or in any place provided by the Township of Saddle River for the detention of prisoners, for a term not exceeding ninety (90) days or to a fine not exceeding Two Hundred Dollars ($200.00) or both. Any person so convicted may, in the discretion of the Magistrate by whom he was convicted, in default of the payment of any fine be imprisoned in the County Jail or place of detention provided by the Township of Saddle River, for any term not exceeding ninety (90) days. . . . Each day that a violation of any of the terms or provisions of this ordinance shall continue shall constitute a separate offense."

[10] Thompson was to be imprisoned for 90 days in the event of default in payment of his fine.

II.

That the storage of the coal is part of a transit privilege does not in itself sustain appellants' claim that the interstate movement had not stopped sufficiently for the state's taxing power to attach when the coal reached and was stored in Coalberg. Cf. *Minnesota* v. *Blasius, supra; Bacon* v. *Illinois*, 227 U. S. 504. It has long been recognized that transit privileges rest "upon the fiction that the incoming and outgoing transportation services, which are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destination." *Central Railroad Co. v. United States*, 257 U. S. 247, 257. See also *Atchison, Topeka & Santa Fe R. Co.* v. *United States*, 279 U. S. 768, 779–780. Of course this fiction, which may be desirable for ratemaking or other purposes, cannot control the power of a state or municipality to tax activities properly subject to exercise of that power apart from the fiction's application to them.

Indeed, the facts of this case demonstrate that here at least the fiction is complete. They show that the journey of the coal from the Pennsylvania mines to Coalberg and the subsequent journeys upon leaving Coalberg were not parts of a "continuity of transit" in the sense held by this Court's previous decisions to preclude a valid exercise of the states' taxing or regulatory powers. See, *e. g., Pittsburg & Southern Coal Co.* v. *Bates*, 156 U. S. 577; *General Oil Co.* v. *Crain*, 209 U. S. 211; *Bacon* v. *Illinois, supra; Susquehanna Coal Co.* v. *South Amboy*, 228 U. S. 665.

A characteristic feature of those cases in which the state has been allowed to tax property which has come to rest after an interstate journey is that at the time the tax is laid it cannot be determined what the ultimate destination or use of the property may be. Thus in *General Oil Co.* v. *Crain, supra*, the oil was shipped to Memphis and held there until required to supply orders from out-of-state customers. In *Brown* v. *Houston*, 114 U. S. 622,

coal sent from Pennsylvania to New Orleans was held taxable in Louisiana because, although some of it was subsequently exported, it "was being held for sale to anyone who might wish to buy." *Champlain Co.* v. *Brattleboro*, 260 U. S. 366, 376. In *Bacon* v. *Illinois, supra*, the grain sent to Bacon's elevator was at his complete disposal. "He might sell the grain in Illinois or forward it as he saw fit." Although his intention was to forward it after inspection, grading, etc., this purpose was held irrelevant. 227 U. S. at 516. And in *Susquehanna Coal Co.* v. *South Amboy, supra*, although there was an anticipation of orders for the coal unloaded at South Amboy, yet there were no actual orders from customers. See also *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249; *Edelman* v. *Boeing Air Transport*, 289 U. S. 249.

Those cases are indistinguishable from this one as to the facts and the effect of the stoppage. Once the coal has reached Coalberg, no one can determine, without receiving an order from the owner, to what point or person it finally will be sent or to what use it will be put. Indeed, at the actual time of storage, even the owner may not know where the coal will go next, for the very purpose of the storage is in part to meet seasonal demand.[11] And while the form of billing is not conclusive, *Minnesota* v. *Blasius, supra*, the fact that the coal is billed to Coalberg and is not rebilled until the owner asks that it be released

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[11] It is to be noted however that the two-year period allowed by the tariff for storage, see note 8, is longer than is necessary to allow for meeting seasonal demand.

Storage-in-transit privileges are supplied, it is said, "as a result of traffic demands." A witness gave the following illustrations:

"(a) Coal is a commodity of seasonal consumption. Most of it is consumed in cold weather. If the mines could produce currently sufficient coal to meet cold weather requirements, the railroads would be swamped with coal traffic during the fall and winter months when other seasonal products are moving in large volume and weather conditions retard transportation operations. By spreading coal ship-

from storage further shows that the final destination is not known by the owner or by others.

Moreover, in all these cases the duration of the cessation of transit is indefinite and in this case may extend as long as two years without loss of transit privilege. Indeed, except for that loss it may extend indefinitely, since under the controlling tariff, Erie does not require, but only reserves the right to require, removal at the end of two years.[12] It is also significant that invariably the goods are fungibles, a fact pointing up the fictional basis of the in-transit privilege. The goods which are sent initially into the interstate commerce stream are not the identical goods which finally arrive at the place of consumption.

In view of all these considerations, the case falls more appropriately in the category allowing the state's taxing power to apply, than in the one denying its applicability.

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ments for winter use over the months of most favorable operating conditions, a more uniform transportation revenue is assured.

"(b) Coal dealers and consumers ship it more uniformly throughout the year by using storage-in-transit privileges under railroad tariffs, and use negotiable warehouse receipts to finance their purchases where necessary.

"(c) The movement during warm weather of the bulk of the winter coal supply avoids car storage and releases cars more rapidly than if they arrived frozen solid, as they often do in winter, where delayed by bad weather or had to wait unloading and use at the place of consumption.

"(d) Experience has shown many instances, like those of recent occurrence, when a supply of stored coal close to the market areas has been necessary to prevent or relieve acute shortages of fuel in cases of labor, weather, or other interruptions in production or transportation.

"(e) A uniform movement of coal during favorable operating conditions, avoids the congestion, delay and increased expense which otherwise attends rush and emergency transportation in winter weather.

"(f) Such storage-in-transit facilitates a more uniform and steady employment, not only of the miners but also of railroad employees, as well as a more uniform and steady railroad revenue."

[12] See note 8.

The interruption hardly can be held to be "due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement," *Minnesota* v. *Blasius*, 290 U. S. at 9–10, broad as may be the latitude given for such incidents of transit. More is involved here than stopping to take advantage of such latitudes. The case therefore is one, again in the language of the *Blasius* case, "where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates. . . ." 290 U. S. at 10.

The facts bring the case exactly within this description, although the record shows that most of the coal after storage goes to other states and little, if any, is distributed locally at Coalberg. Not what ultimately happens to the goods or where they finally go, but the occasion and purpose of the interruption are controlling. "The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied." *Minnesota* v. *Blasius*, 290 U. S. at 10.

Here the cessation takes place not simply for the carrier's transit reasons relating to the necessities or convenience of the journey, but for reasons primarily concerned with the owner's business interests. As in the *Bacon* and *Susquehanna Coal* cases, *supra*, he is entirely free to keep or market the goods in New Jersey or to send them elsewhere. Marketing considerations primarily, and it may be exclusively, determine this choice and many or all of the controlling factors may not arise until after the coal has reached Coalberg or indeed many months later.

The situation in this respect is not materially different from those involved in the *Susquehanna Coal*, *Bacon*, and other cases cited, or indeed from one in which a coal

distributor might place his storage facilities at some distance from his place of market, as at a near-by way station, in order to reduce the cost of his storage operations. That reasons of economy and convenience or even of necessity arising from the absence or prohibitive cost of storage space at the immediate point of distribution might lead him thus to locate his storage operations, and thereby incur the necessity and expense of hauling the goods from storage to market, hardly could be held to make the interruption an incident of transit rather than one of his own business policy and interest. That he may secure the same advantages by using the storage facilities of others for like purposes, rather than his own, does not change the result. In neither case does the arrangement defeat the state's power to tax his property so located or his business thus conducted.

Moreover, as has been noted, some of the coal remains in New Jersey, being shipped out from Coalberg as the shipper directs. As to this all interstate transportation has ended. The fact that the owner elects to take advantage of Coalberg's storage facilities for conducting his storage operations rather than his own located at the point or points of final distribution in New Jersey, whether near to Coalberg or at some distance, does not make the final wholly intrastate movement between those points a leg of the initial interstate movement begun at the mine.

As for the coal moving out of Coalberg interstate, the fact that this movement crosses a state line makes it of course an interstate movement. But this does not make it part of a continuous journey beginning at the mine and ending in the second state of destination. Indeed, not until after the storage has taken place is it determined or can it be known whether this coal will move out of Coalberg interstate or intrastate. And this is because it cannot be known before that time whether the owner's interest, disconnected from the ordinary and usual incidents of transportation, will dictate one market or use rather than

another. Interruptions thus governed cannot be classified as interruptions merely incident to transit or dictated by its necessities or convenience.

The 1939 change in Coalberg's mode of operation did not alter in any substantial way the character, duration or purpose of the stoppage. Since then as before, the primary reasons dictating the shippers' action in taking advantage of it are their business reasons rather than transit reasons as such. Accordingly the state's power to tax the goods stored could not be affected by that change. That the state has chosen to discontinue exercising it as a matter of state taxing policy can make no difference in this respect. Nor can this fact, or the change in method of operation, defeat the state's power to tax the business of furnishing the facilities for storage, since that business also becomes local or interstate depending upon the purposes of the stoppage, whether for transit reasons or chiefly for nontransit ones.

The authorities above cited, it is true, generally involved property taxes levied upon the stored coal. But their controlling principle applies equally to franchise or other taxes upon the business of furnishing the storage facilities. Cf. *General Oil Co.* v. *Crain*, 209 U. S. 211; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500. It would be an impermissible anomaly to hold that the goods stored may be taxed, because the interruption of transit is for nontransit purposes, but that the business of furnishing the facilities for storing them is not affected or governed legally by the same purposes, for applying the state's powers of taxation.

Accordingly, the case is governed by the prior decisions allowing states and municipalities to tax in situations of this sort. It follows that the tax is not forbidden because it is part of a licensing measure. Even where it is undisputed that the commerce is exclusively interstate in nature, "not the mere fact or form of licensing, but what the

license stands for by way of regulation is important." *Robertson* v. *California*, 328 U. S. 440, 458. See also *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202; *Federal Compress Co.* v. *McLean*, 291 U S. 17. Nor does anything in the Interstate Commerce Act forbid local taxation where it is otherwise permissible. The tax therefore is valid under the commerce clause.

III.

Whether the tax and the licensing measure as applied may stand under the Fourteenth Amendment also must be considered. Appellants say that the ordinance is discriminatory and unreasonable. Discrimination is claimed because the ordinance is applicable only to commercial warehouses and not to private warehouses and because there are no other commercial warehousing facilities in the Township subject to the tax. This contention is grounded on the provisions of New Jersey law, noted above, exempting property stored in commercial warehouses from taxation. It also is closely related to the further claim that the tax is prohibitory and unreasonable, and the two claims may be considered together.

> "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. . . . This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 509.

We need not consider in this connection the ultimate power of the state to tax,[13] for we are of opinion that

[13] See the dissenting opinion of Mr. Justice Brandeis in *Liggett Co.* v. *Lee*, 288 U. S. at 570 ff.

neither the selection made here nor the amount of the tax is barred by the Fourteenth Amendment.

The New Jersey Court of Errors and Appeals has held that the present tax is not an illegal evasion of the state laws exempting personal property in commercial warehouses from property taxes, and that the municipality was empowered by state law to levy this tax. Those rulings are conclusive upon us. Nor is it material to any question we have to decide that the practical result of the valid taxing power given the municipality enabled it to make up the loss in revenue suffered when Coalberg was transformed to a public facility.

Constitutionally speaking, the tax is not invalid as being unreasonably large for the privilege conferred.[14] It is not shown that the exaction is unrelated to the value of the privilege conferred and the Court of Errors and Appeals found to the contrary.[15] Private contractual arrangements, such as have been made here,[16] cannot be effective to defeat the state's power to impose such a tax, with the practical effect of relieving the real beneficiaries of the privilege from all taxation by virtue of their success in shunting its burden contractually to the nominal oper-

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[14] The tax, however, may be somewhat larger than the aggregate of the former personal property taxes. Personal property taxes paid prior to 1939 amounted to about $12,000 a year. Estimates of this tax given in the record vary from about that sum to around $20,000 a year. The variation corresponds to different estimates of the area, in terms of footage, constituting the base for calculation of the tax.

[15] See note 14. Cf. the dissenting opinion of Mr. Justice Brandeis in *Liggett Co. v. Lee*, 288 U. S. at 573, "The Federal Constitution does not require that taxes . . . be proportionate to the differences in benefits received by the taxpayers. . . . or that taxes be proportionate to the taxpayer's ability to bear the burden."

[16] The record discloses that the present agreements between Independent Warehouses and the coal company are from year to year until terminated upon notice.

ator.[17] And the suggestion that the tax under the ordinance is prohibitive can carry no weight in view of the fact that substantially equal personal property taxes were paid prior to 1939.[18]

Appellants' other arguments may be given shorter disposition. The contention that Thompson's conviction is "unlawful" is answered by the decision of the New Jersey Court of Errors and Appeals which held that the municipality possesses the power which it exercised to convict persons working in unlicensed warehousing premises as well as to prohibit corporations and others from carrying on the business of warehousing without obtaining a license. Thompson was convicted not for his employer's act but for his own.

It is suggested also that the ordinance gives to the municipality an uncontrolled discretion to revoke the license and is therefore invalid for uncertainty, since it permits the Township Committee to "revoke any such license for sufficient cause after notice and hearing." Appellants have made no attempt to secure a license and therefore are not in position to attack the revocation provisions of the ordinance. Cf. *Bourjois, Inc.* v. *Chapman*, 301 U. S. 183, 188, and authorities cited.

Finally the ordinance is said to be invalid because of the provision for cumulative penalties.[19] The penal provisions however have not been imposed cumulatively in this case. Moreover the New Jersey Court has held them

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[17] Cf. *Browning* v. *Waycross*, 233 U. S. 16, 23; *Federal Compress Co.* v. *McLean*, 291 U. S. 17, 22: "It is not within the power of the parties, by the descriptive terms of their contract, to convert a local business into an interstate commerce business protected by the interstate commerce clause."

[18] See note 14.

[19] The ordinance makes each day's continuance of violation a separate offense.

separable,[20] if illegal. In such circumstances, the objection that the mere unapplied provision for cumulation violates the Fourteenth Amendment is without substance. *Louisville & N. R. Co.* v. *Garrett*, 231 U. S. 298, 311, and authorities cited.

The judgment is

Affirmed.

[20] The New Jersey Court of Errors and Appeals stated: "The ordinance contains a provision that in case 'any action or part' thereof shall be held illegal or unconstitutional, such invalidity 'shall not be construed as impairing the force and effect of the remainder of the ordinance.' If it be conceded *arguendo*, that the cumulative penalty clause is invalid in whole or in part, the remainder of the provision for sanctions is severable and would stand unaffected."

SUPREME COURT OF THE UNITED STATES

No. 83.—October Term, 1946.

Independent Warehouses, Inc., Pennsylvania Coal Company, Erie Railroad Company and James Thompson, Appellants, *v.* William Scheele, Recorder of the Township of Saddle River, and the Township of Saddle River.	Appeal from the Court of Errors and Appeals of the State of New Jersey.

[April 14, 1947.]

Mr. Justice Frankfurter, concurring.

The dissenting views lead me to add a few words to the Court's opinion, in which I join.

Nearly thirty-five years ago Mr. Justice Holmes observed that "one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end." (Holmes, Speeches, Law and the Court, 98, 102). His concern has not lost force with time, and it is important to be duly mindful of it whenever a State claims the power to tax in a situation like that now before us.

Equally relevant are other observations by Mr. Justice Holmes regarding this problem. "It being once admitted, as of course it must be, that not every law that affects commerce among the States is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the States both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines." *Galveston, Harrisburg, etc. R. Co.* v. *Texas*, 210 U. S. 217, 225.

And so, this Court has sustained a tax upon the mining of ore although substantially all the ore left the State and was put upon cars for that purpose by the same act by which it was produced. *Oliver Iron Co.* v. *Lord*, 262 U. S. 172. Mr. Justice Holmes joined in that opinion although "There could not be a case of a State's product more certainly destined to interstate commerce." Holmes, J., dissenting in *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 600, 601. Again, the Court has held that a State may impose a non-discriminatory tax on goods which, although connected "as a general course of business" with "a flow of interstate commerce," "has come to rest and has acquired a situs within the State" at "a depot . . . for another interstate journey." *Minnesota* v. *Blasius*, 290 U. S. 1, 8, 11. For the practical purposes which determine the constitutional issue there can be no difference between taxing such goods as property and taxing the business of being a depot for such goods. In striking the constitutional balance between State and national powers, figures of speech are treacherous. The ore which Minnesota was allowed to tax in the *Lord* case, and the cattle which Minnesota was allowed to tax in the *Blasius* case, were in no practical sense less in the "flow of commerce" than the coal the storage of which was the business subjected to a non-discriminatory license tax by New Jersey.

Nor can it make a difference that this storage business was conducted by a concern controlled by the coal-carrying road. If a wholly independent storage concern would have had to pay a license tax, the controlling constitutional principles require no different result because the storage facility is a subsidiary of a railroad. Presumably there are good business reasons for the use of such a subsidiary corporation. Compare *Edwards* v. *Chile Copper Co.*, 270 U. S. 452, 456. Those reasons are equally valid for the State's taxing purposes. It cannot be said that

New Jersey has given no opportunities, has afforded no protection, and has conferred no benefits upon Independent Warehouses, Inc., merely because in an ultimate sense there is a financial identification between Independent Warehouses and the Erie Railroad. Compare *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444. If what was here involved were merely an occasional and transient storage of coal moving from Pennsylvania to New York, New Jersey could not levy a property tax on the coal nor a license tax for the storing of it. The controlling consideration here is that there was storage of the coal precisely like the holding of the cattle in the *Blasius* case. In both cases there was a sufficiently distinct and permanent break in the process of transportation between the States so as to give rise to interests in the State of storage to justify the exertion of its non-discriminatory taxing power. For me this case is controlled by *Susquehanna Coal Co. v. South Amboy*, 228 U. S. 665. Here, as in that case, there was something more "than an incidental interruption of the continuity" of the coal's "journey through the State." There was "a business purpose and advantage in the delay which was availed of, and while it was availed of, the products secured the protection of the State." 228 U. S. at 668 and 669. Thereby the State's power to tax arose.

The fact that for railroad-rate purposes this storage was treated as part of a transit privilege does not affect the relation of the storage to the taxing powers of the State. Assuming that such a storage may properly be treated as a stop-over privilege under the Interstate Commerce Act, it does not follow that the break in the process of interstate transportation is not of such significance in its relation to a State as to allow that State to tax the protection given to the property during the break as well as the opportunity afforded in conducting the business for such separable and enduring storage in the State.

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Mr. Justice Jackson, with whom Mr. Chief Justice Vinson joins, dissenting.

The Erie Railroad Company is a common carrier engaged in interstate commerce. By a specific tariff filed with the Interstate Commerce Commission pursuant to the Interstate Commerce Act it and several other rail carriers have long published a joint and proportional through-tariff on anthracite coal from coal mining stations in Pennsylvania to points in New York and New Jersey. The tariff provides for storage-in-transit services at Coalberg, New Jersey, with reshipment to destination under original agreements. Independent Warehouses, Inc., as contract agent for the Erie, operates these storage-in-transit facilities, has custody of the coal in storage under Erie tariffs as a public warehouseman, and issues warehouse receipts for coal received under railroad waybills. Title to Coalberg is in the Pennsylvania Coal Co., a wholly-owned subsidiary of Erie, and it receives from Independent Warehouses one dollar per year for its lease. The Erie ultimately bears all losses and gets all gains. It is apparent that Coalberg is a facility for storage in transit of coal operated as part of the Erie's interstate transportation service.

The function of the storage in transit is vital. During the summer season, consumption of anthracite coal is light and neither dealers nor consumers in the City of New York and elsewhere are able to store adequate winter reserves. At critical times there would be grave danger of inadequate fuel supplies from interruptions of transportation or of mining operations if stock piles were not accumulated near consuming centers, such as New York, to be drawn upon in periods of peak demand. Therefore, the railroad accepts coal shipments which it mingles in stock piles at Coalberg, near New York, with the privilege to the shipper of ordering the same grade and quantity sent on to destination as needed. When orders for reshipment come, they are drawn from stock piles and delivered. Storage-in-transit is a device to equalize the demands on coal transportation facilities and to provide a reserve supply of coal for periods when consumption exceeds production, to enable movement away from the mines during the period when production exceeds consumption, and to finance future purchases by warehouse receipts issued against coal in transit. It is an essential part of dependable and low-cost transportation of anthracite coal from the mines to the great metropolitan consuming area.

For the privilege of operating this storage-in-transit facility at Coalberg in New Jersey, the municipality demands an annual license fee, in advance, which it is alleged would amount to $20,475. This is merely for the privilege of doing the business. The property used in the operation is also subject to the usual property tax on a valuation of $133,875, which is not in question.

The issue is whether this local privilege tax unconstitutionally burdens interstate commerce. The burden and its substantiality are undeniable, but the Court concludes that these local assessments upon interstate traffic are within the power of the state and, of course, the amount, be it $20,000 per year or $20,000,000 per year, is wholly

for the local authorities to determine if their power to tax is upheld.

I cannot agree that the commerce clause of the Federal Constitution has left interstate traffic vulnerable to such local permissions and burdens. Because the immediate impact of the tax is on a railroad, we should not delude ourselves as to its real effect. It is a tax on traffic—on the movement of goods—and its weight is shifted from the carrier to the consumer. There is, of course, a "local incident," a stoppage in transit, a reloading. "Local incidents" of some sort can be identified in all interstate transportation. But in this case local sales or deliveries are insubstantial in amount. The whole operation is incidental to interstate transportation and not to any local business. It is integrated in operation, ownership and management with transportation. It is under the federal comerce power and under Interstate Commerce Commission regulation. The stoppage may be longer than many other stoppages in transit incident to railroading. But the storage of perpetually renewed and continuously drawn-upon stock piles is no longer than necessary to adapt transportation facilities to the needs of an economy, one end of which must engage in continuous production and the other in only seasonal consumption. That a single municipality or state can fasten local tax burdens upon such an incident makes interstate commerce vulnerable to the very barriers and obstructions the commerce clause of the Constitution was designed to end.

The unedifying story of Colonial rivalry in preying upon commerce, which more than any one thing made our Federal Constitution a necessity, is too often told by historians to justify repetition. This tax is reminiscent, however, of some phases of that commercial warfare. In 1787 New York was being supplied with firewood from Connecticut and much farm produce from New Jersey. It seized upon "local incidents" to lay a tax. Every sloop which came

down through Hell Gate, every cart of firewood entering the city, and every market boat rowed across the Hudson River had to pay heavy entrance duties. Then came retaliatory measures. See Fiske, *The Critical Period of American History*, Chap. IV. These chronic quarrels were destroying the trade of all the rivals, and it was sought by the Constitution to free trade from local burdens and controls.

This New Jersey tax on transportation of New York's coal supply is more dangerous in the end than the old New York tax on its own firewood. In that case the consumers who ultimately would pay the tax also controlled the government which shortsightedly laid the tax. It was a tariff, and the tariff-ridden people could remove it.

But here the ultimate burden of the tax falls on consumers of New York and elsewhere who have no representation in the government which lays the tax and fixes its amount. The authorities who fix the tax will never have to answer to those who pay it. That is the evil of "taxation without representation." Here is a tax that falls immediately upon a single taxpayer, for it does not appear that any other is similarly affected. It is a tax that falls ultimately on non-residents of the taxing authority. If it is valid, I know of no reason why the community should bear any of its own tax burdens. This is the great vice of these local burdens on interstate movement of goods. If this is not the sort of burden and barrier to a nation's free trade that our commerce clause was designed to end, I should think one would be hard put to find an example. This decision represents a trend that seems to me quite out of the spirit of our history and quite as detrimental to our commercial welfare and unity. See my concurring opinion, *Duckworth* v. *Arkansas*, 314 U. S. 390, 397. I am not unaware of the needs of this locality, as of all others, for revenue. But it seems to me that the activities at Coalberg are as fully in the current of inter-

state commerce as those we held immune from state taxation in *Freeman* v. *Hewit*, decided December 16, 1946, and *Joseph* v. *Carter & Weekes Stevedoring Co.*, decided March 10, 1947. The storage-in-transit service is as essential to maintaining and as much a part of the flow of coal as loading and unloading of goods shipped in interstate commerce is of that commerce. The Constitution laid restraints upon each locality lest their local advantages be pursued at the cost of the commerce on which the prosperity of all depends. I would reverse the judgment.